DOCTOR OF PHILOSOPHY

Under what circumstances can a democratic country take steps to legally dissolve a political party?

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TABLE OF CONTENTS

Chapter 7: Conclusion

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Candidates Declaration

I declare that I am the author of this thesis; that, unless otherwise stated, all references cited have been consulted by me; that the work of which the thesis is a record has been done by me, and that it has not been previously accepted for a higher degree.

Table of Cases

Council of Europe

German Communist Party v Federal Republic of Germany, Application 250/57, YB 1, 222

Handyside v United Kingdom, (1979-80) 1.E.H.R.R. 73

X v Italy, Application 6741/74, DR 5, 83

Lingens v Austria 8 E.H.R.R. 407, 1986

Purcell v Ireland (App No 15404/89) (1991)

Brind v United Kingdom (1994) 18 EHRR CD 76

United Communist Party of Turkey (1998) 26 E.H.R.R. 121

Socialist Party v Turkey (1999) 27 E.H.R.R. 51

Ozdep v Turkey (2001) 31 E.H.R.R. 51

Dep v Turkey App. No 25141/94 (2002)

Refah Partisi v Turkey (No 1) (2002) 35 E.H.R.R. 3

Government of the Autonomous Basque Community of Spain v Spain (App. No 29134/03)

People's Labour Party v Turkey (2003) 36 E.H.R.R. 6

Refah Partisi v Turkey (No 2) (2003) 37 E.H.R.R. 1

Norwood v United Kingdom (2005) 40 E.H.R.R. SE11

Sahin v Turkey (2005) 41 E.H.R.R. 8

Partidul Communistilor v Romania, (2007), 44 E.H.R.R. 17

Batasuna v Spain (2009) application no 25817/04

Czech Republic

Supreme Administrative Court decision on Workers Party Prohibition, Pst 1-2009 (2010)

Constitutional Court decision on Workers Party Prohibition, Pl. US. 13/10 (2010)

Instruments

International

Universal Declaration of Human Rights (1948)

International Covenant of Civil and Political Rights (1966)

Declaration on Principles of International Law concerning Friendly relations and Co-operation among States in Accordance with the Charter of the United Nations. (1970)

Regional

Convention for the Protection of Human Rights and Fundamental Freedoms in Europe (1950)

European Commission for Democracy through Law- Guidelines for the Dissolution of Political Parties and Analogous measures (1999) available at www.venice.coe.int/docs/CDL-INF(2000)001-e.html

Council of Europe Convention on Prevention of Terrorism (2006)

European Commission For Democracy through Law (Venice Commission) opinion on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey Strasbourg, 13 March 2009 opinion No. 489/2008

Domestic Constitutions

First Amendment to the Constitution of the United States (1791)

Basic Law of the Federal Republic of Germany (1949),

Constitution of Spain (1978)

Canadian Charter of Rights and Freedoms (1982)

Constitution of the Republic of Turkey (1982)

New Zealand Bill of Rights (1990)

Constitution of Bulgaria (1991)

Constitution of Czech Republic (1992)

Constitution of Ukraine (1996)

Constitution of the Republic of Poland (1997)

Charter of Fundamental Rights and freedoms of Czech Republic (1999)

Constitution of Romania (1991)

Legislation

Austria

Verbotsgesetz Prohibition Law (1947)

Israel

Law on Political Parties 1992

Basic Law 7(A) Amendment 35, 2002

Italy

Legga Scelba, Law 645, 1952

Spain

Organic Law of Political Parties (L.O.P.P) 2002, 6/2002

Article 581 of Penal code

Turkey

Article 312 of Penal code

Law no 2820 on Political Parties (1983)

United Kingdom

Representation of the People Act 1832 2&3 Will IV

Ballot Act 1872 35&36 Vict.c.33

Restoration of Order in Ireland Act 1920 10&11 Geo.5.c.31

Civil Authorities (Special Powers) Act (1922) 12&13 Geo.5 c.5

Representation of the People Act 1928 18&19. Geo.5.c.12

Public Order Act 1936 - 1 Edw. 8 & 1 Geo. 6 c. 6

Ministers of the Crown Act 1937 c.38

Emergency Powers (defence act) 1939- 2 & 3 Geo. 6 c. 62

Representation of the People Act (1969) c.15

Public Order Act 1986 c.64

Crime and Disorder Act 1998 c.37

Human Rights Act 1998 c42

Political Parties, Elections and Referendum Act 2000 c.41

Terrorism Act 2000 c.11 -SI 2001 No 1261, SI 2002 No 2724; SI 2005 No 2892; SI 2006 No 2016 and SI 2007 No 2184

Racial and Religious Hatred Act 2006, c.1

Terrorism Act (2006) c.11

United States of America

Bipartisan Campaign Reform Act 2002, Pub.l. 107-155, 116 Stat. 81 (2002)

United States Criminal Code, 18 USC ss2385

Indiana Ann. Stat. Section 29-3182, (1969)

United States Role of Congress 2 U.S.C. Section 441

United States Criminal Code 18 U. S. C. §2339

Parliamentary Reports

Hansard Commons Draft Terrorism Bill, Written and Oral evidence, HC-515-1 (2005)

Joint Committee on Human Rights, Third Report, 2005, HL75-1, HC 651-1

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Abstract summary

An effective representative democracy requires the maintenance of both individual and collective political rights especially those of freedom of expression and association. Recognising the intrinsic value of political parties to modern representative democracy and identifying four basic principles of democracy, this thesis will examine the steps taken within several modern democracies to restrict political rights for the greater good with particular emphasis on freedom of association as exemplified by political parties. Looking at a number of case studies, it will examine the mechanics of restriction and more fundamentally assess their legitimacy against a template of four principles. These are Representation, Popular Sovereignty, Equal Respect and Changeability. The Thesis will argue that a satisfactory balance between these principles requires the facilitation of substantive disagreement as long as such disagreement does not both ideologically and practically pose a fundamental threat to the continuation of democratic government. Legislation and Jurisprudence will be analysed across jurisdictions with respect to issues ranging from racist parties to those espousing totalitarian ideologies as well as those at least symbolically committed to violence and/or political Islam. This Thesis will conclude that for a prohibition to be legally and morally justified, it should pass a high evidentiary threshold regarding both an ideological and practically feasible challenge to democratic government.

Intro:1

> "Freedom of political debate is at the very core of the concept of a democratic society."[1]

The quotation above is representative of the notion that there exists both a clear and symbiotic relationship between the concept of democracy as a system of government and the political rights of freedom of expression and association. It encapsulates a belief that while a democratic system of government requires the maintenance of political rights, the effective operation of such rights is only possible in a democracy. Implicit within this relationship of interdependence is the notion that there should be very few, if any, permissible restrictions of these rights within a democratic polity.

Such an idea is not without its critics. It has been evident that in the decade following 9/11, vital questions have emerged within democracies concerning the advocacy of political violence and the subsequent response to such advocacies by democratic governments. Whilst acknowledging that terrorism is hardly a new phenomenon, Wojciech Sadurski has argued that recent events have amplified the relevance of such issues.

> "…it is undoubtedly true that since the attacks in the US on 11 September 2001, the bombings in Madrid on 11 March 2004 and in London on 7 July 2005, the gravity of the danger of terrorism and arising from possible (and sometimes real) responses to it is qualitatively different."[2]

Despite its contemporary resonance, the idea of permissible restrictions of political rights is neither new nor simply a function of a desire to protect public safety. As early as the inter-war years, proponents of a theory known as 'militant democracy' argued that restrictions on political expression and association (most notably the

[1] Lingens v Austria,(1986) 8 E.H.R.R. 407, article 42
[2] Wojciech Sadurski (ed) *Political Rights under stress in 21st Century Europe*, (Oxford University Press) 2006, 8

dissolution of anti-democratic parties) were necessary to protect the fledgling democracies of Europe from the seemingly inexorable march of the totalitarian ideologies of both Communism and Fascism.[3] The subsequent collapse of the Weimar Republic into the Third Reich and the post-war Communist takeover of Eastern Europe seem in hindsight to provide at least a superficial credence to such analysis. As will become apparent throughout this thesis, debates surrounding the legitimacy of such restrictions have a relevance which is both contemporary and goes beyond the overt issues of violence and totalitarianism. While this thesis will within certain contexts allude to and discuss restrictions on political rights such as freedom of expression and the right to cast a meaningful vote, its primary emphasis will be on limitations to the right of freedom of association and more specifically on legal measures designed either to prohibit the formation of specific political parties or dissolve existing ones. The main goals of the thesis are twofold. The first is to establish a theoretical template against which both the existence and legitimacy of specific restrictions can be assessed. The second is to identify circumstances (if any) where such legal interventions can be properly justified on democratic grounds.

Clearly, within any democracy, the existence and application of such measures have potentially profound repercussions and provoke unsettling questions.

> "The dilemma implied…is obvious: isn't the medicine so strong that it will kill the patient? Or, if the remedy is not applied, will the patient still survive?"[4]

A coherent assessment of the democratic legitimacy of any legal intervention requires at a basic level both an understanding why democracy is morally preferable to alternative systems of governance alongside an identification of the underlying principles that sustain and reinforce its normative validity. It is to these first tasks that this introductory chapter now turns.

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[3] The term Militant Democracy was first coined in 1937. See Karl Lowenstein, 'Militant Democracy and Fundamental Rights' in American. *Political Science Review Volume 31* (1937) it is a theory which allows for the restriction of individual democratic rights in order to ensure that democracy as a whole cannot be overturned. Its main arguments are examined later this chapter

[4] Sadurski, Op cit, 10

Intro:2 A moral justification of democracy

Democracy, like any system of collective authority is based on a fundamental paradox.[5] As a collective choice procedure, it produces coercive laws that individual citizens are expected to both obey and respect even if and when they disagree with them. Such coercion 'requires justification'[6] and legitimate questions therefore exist as to why recalcitrant citizens should abide by any collective decisions they dissent from. At a general level, such a question can only be answered by providing a moral justification for democracy itself. An appropriate basis for such a justification is, however, itself the subject of contention and debate between two differing approaches known as procedural and substantive democracy. The dispute between these approaches not only furnishes the quest for a moral justification of democracy but has fundamental implications for the more specific question of the legitimacy of party prohibition.

Any moral justification of democracy must be at least partially dependent on a clear conception of what democracy actually is. A school of thought classifiable as the aggregative tradition '…has bequeathed a view of democracy in which competing for the majority's vote is the essence of the exercise'[7] and therefore the challenge for proponents of democracy is to design fair and just 'rules to govern the contest.'[8] From within this school, a justification for democracy has emerged which is consequently premised on its apparent procedural fairness. Alternatively, a competing conception known as deliberative democracy places its emphasis primarily on the ways in which the freedoms inherent in the democratic process[9] help foster a collective deliberation which can be utilised '…to alter preferences so as to facilitate the search for a common good.'[10] The significance attributed to the search for a 'common good' betrays a belief in desirable outcomes indicative of a moral justification of democracy premised on its ability to achieve substantive goals and policies. The dispute surrounding the validity of the two approaches can be presented as a modern day

[5] Richard Wollheim, 'A paradox in the Theory of Democracy' in P. Laslett & W. Runcimann (eds), *Philosophy, Politics and Society,* Second Series, Basil Blackwell, 1969, 84
[6] Jules Coleman and John Ferejohn ' Democracy and Social Choice' in *Ethics,* Volume 97(1), 1986, 7
[7] Ian Shapiro, *The State of Democratic Theory,* Princeton University Press, 2003, 3
[8] Ibid
[9] Examples include freedom of expression and association
[10] Shapiro, Op cit

version of Plato's *Euthyphro* dilemma. Are outcomes good because they are democratically chosen or democratically chosen because they are good?[11]

Intro:2:1 Procedural Fairness

The procedural conception bases its justification of democracy on a notion of the fundamental equality of persons. In acknowledging the existence of a wide diversity of both interests and preferences within a polity, it asserts that the value of democracy lies in the fact that it allows each of its citizens an equal opportunity to contribute to the making of collective decisions.

> "Egalitarian theories attempt to derive a conception of democracy from a principle of equality among persons. They acknowledge fundamental conflicts of interests and convictions in society and assert that because of this lack of consensus, each person may demand an equal share in political rule."[12]

Democracy is thus defined as a procedure that allows for the equal expression of articulated and informed preferences. By facilitating an equal expression of preference, democracy ensures an equal consideration of interests.

> "That each person has a vote; has adequate means to acquire understanding of their interests and has the means for making coalitions with others as well as getting equal representation in a legislature is a publicly manifest phenomenon… The only publicly accessible way to implement equal consideration of interests is to give each citizen the means for discovering and pursuing his or her own interests."[13]

However, while such an approach is premised on the idea of human equality, its practical application may potentially have negative implications for that very same

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[11] Plato, *Euthyphro*, first published in 380 BC translated by Benjamin Jowett and republished by Forgotten Books at www.forgottenbooks.org, 2008, 10-20- The dilemma portrayed by Plato as being framed within a conversation between Socrates and Euthyphro poses the question of whether 'the pious are loved by the gods because they are pious or whether they are pious because they are loved by the gods.'

[12] Thomas Christiano, 'Democracy as Equality' in David Estlund, *Democracy*, Blackwell Publishing, 2004, 31

[13] Ibid,, 43-44

principle. Firstly, while a formal commitment to one person, one vote and equal rights of expression and association suggest an equal consideration of interests, the existence of vast disparities of income and wealth as well as educational inequalities within democratic polities affects the ability of citizens to participate on an equal basis.[14] Next, while the complementary questions of who should participate in collective decisions and how much their preferences should count in an aggregative capacity are premised on equality, the question of how decisions are then reached has implications which at its core is premised on inequality. As will be discussed in more detail later[15], the system of majority rule inevitably privileges the preferences of those in a majority over those residing in a minority. Finally, the privileging of the preferences of those in a majority may (if unchecked) lead to outcomes which are inherently unequal and even unjust.

However, according to proponents of the *procedural* approach, the policies that are produced by democracies are irrelevant. To attempt to impose the achievement of substantive outcomes on the democratic process is to attempt to equally satisfy as well as to consider interests. Thomas Christiano has argued that such a task is impossible because of a lack of knowledge regarding how to satisfy all interests and a corresponding lack of consensus on which interests are important.[16] Such indifference towards outcomes is, as argued above, potentially troublesome. To justify democracy merely on the grounds of procedural fairness ignores the possibility that there may exist a potential '…distinction between a procedure being fair in itself and its being designed to produce fair or unjust legislation. An intrinsically fair procedure may well produce unjust laws and policies.'[17] Consequently, opponents of a purely procedural approach argue that a comprehensive justification of democracy must be based on an assessment of its propensity to produce fair or just substantive outcomes as well as providing a basic equality of input. In other words, democracy should be defended not simply on a concern for procedural equality but also with reference to the substantive quality of the decisions that it produces.

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[14] Fabienne Peter, 'The Political Egalitarian's dilemma' in *Ethical Theory and Moral Practice,* Volume 10, 2007, 374-75
[15] See Intro:3:2:4
[16] Christiano, Op cit, 40-42
[17] William Nelson, *On Justifying Democracy,* Routledge and Kegan Paul, 1980, 156

> "It is often said that a democratic state, in order to be fully legitimate, must not only issue its laws in a procedurally correct way but must also ensure that they comply with certain substantive values. Democracy, it is said, not only requires designing and following the correct procedures but its laws must in addition comply with certain values, such as human dignity, liberty, equal concern for all etc., in order to be fully legitimate."[18]

Proponents of such a view subscribe to what can be classified as a substantive conception of democracy. As we shall see, however, such a conception by itself fares no better than a purely procedural approach in furnishing democracy with an adequate moral justification for its existence.

Intro:2:2 Substantive Democracy

> 'Democracy is not a good thing in itself. It is what makes good things possible.'[19]

Those who advocate a substantive justification of democracy believe that democracy is a collective choice procedure which tends to produce fair and just outcomes. Arguments range from the modest claim that the accountability engendered by competitive elections can act as an incentive for governments' to avoid catastrophes such as famine[20] to the more grandiose assertion that the freedom of debate characteristic of a democratic polity is necessary for both the discovery of objective truth[21]and individual self-fulfilment.[22] While these and other outcomes may indeed be measured as substantive goods, there are fundamental problems in basing a justification for democracy entirely on its ability to achieve specific outcomes.

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[18] Wojciech Sadurski, 'Law's Legitimacy and Democracy Plus' in *Oxford Journal of Legal Studies,* Volume 26(2), 2006, 377-409, 377
[19] Njabulo Ndebele quoted in John Keane, *The Life and Death of Democracy,* Simon and Schuster, 2009, 853
[20] Amartaya Sen, *Development as Freedom,* Oxford University Press, 1999,152
[21] Eric Barendt, *Freedom of Speech, 2nd Edition* (Oxford University Press) 2005, 8-13
[22] Ibid, 13-18

Firstly, such an approach is 'contingent upon the achievement of non guaranteed goals or policies.'[23]This has consequences for the long term viability of democracy. For example, if it can be ascertained that an alternative form of government is just as or more likely to produce what are temporally deemed to be desirable outcomes, (potential examples include the equation of Fascism with both law and order and a strong foreign policy or Communism with economic equality) then the moral basis for democratic governance becomes potentially very fragile. As Robert Dahl has argued; an insistence on substantive democratic outcomes can quickly degenerate into a 'deceptive label for what is in fact a dictatorship.'[24] Secondly, to base a justification of democracy on its ability to achieve fair and just substantive outcomes ignores the existence of deep-seated disagreement concerning which outcomes or policies would be constitutive of justice and fairness.

> "…all contemporary constitutional democracies are pluralistic, meaning that individuals within them disagree over *the* good. In pluralist polities, therefore, politics and political rights are concerned not only with implementation of the common good but also with handling conflicts among proponents of competing conceptions of the good."[25]

Whilst acknowledging the existence of a plurality of values and interests within democratic polities, deliberative democrats such as John Rawls[26]and Jurgen Habermas[27] have argued that it remains possible to achieve a rational consensus on the question of political institutions which are fair and just.

> "Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which

[23] Peter Jones 'Political Equality and Majority Rule' in David Miller and Larry Seidentop, *The Nature of Political Theory,* Clarendon Press, 1983, 160
[24] Robert Dahl, *Democracy and its Critics,* Yale University Press, 1989, 163
[25] Michel Rosenfeld ' A Pluralist Theory of Political Rights in Times of Stress' in Wojciech Sadurski(ed), *Political Rights under Stress in 21st Century Europe,* (Oxford University Press) 2006, 15
[26] John Rawls, *Political Liberalism,* Columbia University Press, 1993
[27] Jurgen Habermas, *Between Facts and Norm: Contributions to a discourse theory of Law and Democracy* , MIT Press, 1996

> all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."[28]

It is doubtful whether such a scenario is achievable. Chantal Mouffe has argued that a search for a rational consensus within a democratic polity is inherently flawed. Firstly, such a pursuit is exclusionary in that those views which coincide with the consensus will be accorded the definition 'reasonable' while those which do not will be placed outside an orbit of acceptability and deemed 'unreasonable.' Such a differentiation represents at the very least a dilution of the principle of equal respect.

> "For who decides what is, and what is not, 'reasonable'? In politics the very distinction between "reasonable" and "unreasonable" is always the drawing of a frontier. It has a particular character and it is the expression of a particular hegemony."[29]

Secondly, the contention that a rational consensus can be achieved misunderstands both the existence and desirability of fundamental disagreement within a democracy[30] and consequently neglects the role of passions and collective identities as motivating forces for political participation. A consensus based on individual rationality does not represent the high point of politics but a limitation and dilution of its real nature.

> "What is misguided is the search for a final rational resolution. Not only [cannot it] succeed, but moreover it leads to putting undue constraints on the political debate. Such a search should be recognized for what it really is, another attempt at insulating politics from the effects of the pluralism of value, this time by trying to fix once and for all the meaning and hierarchy of the central liberal democratic values."[31]

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[28] Rawls, Op cit, 137
[29] Chantal Mouffe 'Political Liberalism' Neutrality and the Political' in *Ratio Juris:* Vol 7(3) December 1994, 321
[30] See Jeremy Waldron, *Law and Disagreement,* Oxford University Press, 1998
[31] Chantal Mouffe 'Deliberative Democracy and Agonistic Pluralism' in Institute for Advanced Studies (Vienna), *Political Science Series,* Volume 72 (2000), 9

It is contended, therefore, that neither a procedural nor substantive approach can by themselves provide democracy with a morally adequate basis for its existence. A purely procedural approach undermines its own commitment to equality and is as a consequence recklessly apathetic toward outcomes while a merely substantive view either conveniently ignores or attempts to transcend the existence of fundamental and legitimate disagreement within a democratic polity. Given these inadequacies, there exists a need for a more comprehensive and coherent rationalization for democracy which combines the principle of equality inherent in proceduralism with an explanation as to why such procedures are likely to produce outcomes which embody substantive goods.

Intro.2.3 A balanced approach

In a 2007 work,[32] David Estlund attempts to steer such a course between the two differing approaches. Whilst acknowledging that democracy 'does seem like a fair way to make decisions…'[33] he contends that its 'moral importance' [34] cannot be simply attributed to fairness of procedure. Such attribution can, he argues, also be used to justify a coin toss to decide between two policy options or a system of lottery or rotation to select office holders. Such procedures are illegitimate because they fail to take any account of an 'epistemic dimension'[35] to decision making. Referencing the modern jury trial, Estlund contends that citizens accept jury verdicts because a jury trial contains 'considerable epistemic virtues'[36] including evidence, testimony, cross examination and collective deliberation. Whilst jury verdicts are clearly not infallible, their epistemic characteristics give them a moral value

> 'So its epistemic value is a crucial part of the story. Owing partly to its epistemic value, its decisions are …morally binding even when they are incorrect.'[37]

Therefore, the moral basis for accepting the verdict of a jury is not that their decisions are always unquestionably correct but that both the fairness and epistemic dimension

[32] David Estlund, *Democratic Authority,* Princeton University Press, 2007
[33] Ibid, 6
[34] Ibid
[35] Ibid
[36] Ibid, 8
[37] Ibid

inherent within the process makes reaching a correct decision more likely. Similarly, democratic decision making can be justified on the grounds that the procedural equality inherent in both rights of expression and association and the electoral process is not only intrinsically fair but has a substantive epistemic dimension in that it facilitates both an airing of the substantive disagreement intrinsic to modern democracies and subsequently a form of collective deliberation which is likely to produce informed decisions rather than ones reached by the application of purely random procedure.

> "Democratically produced laws are legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions. It is not an infallible procedure, and there might even be more accurate procedures. But democracy is better than random and is epistemically the best among those that are generally acceptable in the way that political legitimacy requires."[38]

Estlund's epistemic proceduralism succeeds, it is contended, in producing a justification for democratic governance which combines procedural fairness with a substantive epistemic dimension that acknowledges the existence and indeed desirability of open and fundamental disagreement. In doing so, it consequently avoids the ambivalence towards unjust outcomes and propensity towards artificial consensus characterized by the procedural and substantive approaches respectively. The following section of this chapter will build upon Estlund's attempt to conceive of democracy in both procedural and substantive terms by identifying four principles which it will be argued are central to both the practical operation of modern democracies and the continuing existence of substantive disagreement and consequently themselves contain both procedural and substantive elements.

[38] Ibid

Intro.3 Four Guiding Principles

As has just been argued; any convincing moral justification of democracy requires a balance to be struck between procedural and substantive elements which facilitates both the existence and continuation of fundamental disagreement. Similarly, an exposition of the processes of modern democracy unveils four principles containing both procedural and substantive elements which when aligned in a satisfactory balance contribute greatly to the maintenance of substantive debate essential to the epistemic virtue of democracy. Firstly, *Representation* can be presented both as a procedural response to the size and complexity of modern democracies but also a necessary mechanism for reflection of the substantive disagreement that subsequently exists therein. Secondly, *Popular Sovereignty* embodies a substantive commitment to the realization of a polity functioning according to the wishes of the people but is premised upon a competitive electoral procedure which recognises a diversity of interest and preference and consequently a lack of a settled democratic consensus. Next, while the principle of *Equal Respect* acts as a procedural prerequisite for the operation of representative elections, it can also be utilized to place limits on the substantive outcomes these procedures generate. Finally, the idea of *Changeability* while acting as a fundamental motivation for participation in democratic procedures can also be interpreted as a potential substantive threat to those same democratic procedures. These principles often complement and reinforce each other. However, they can also if applied without qualification pose a concomitant threat to not only each other but specific manifestations of themselves. Later in this introductory chapter, it will be argued that achieving a satisfactory equilibrium between these principles should inform both legislation and case law regarding the specific issue of banning political parties. Next, however, the remainder of this section will make a more general evaluation of these principles with the dual aim of explaining their core assumptions alongside identification of potential tensions and inconsistencies that reside both within and between them.

Intro:3:1 Representation

> "In modern societies, government does not claim to rule the people; by electing politicians to act on their behalf, government is

> representative of the people. Representative government should therefore be viewed as the method by which the people are able to govern themselves."[39]

Contemporary democracy is primarily representative in nature. Within this paradigm, elections are viewed as the predominant mechanism by which the populace can control the policies that governments follow. Rather than directly selecting the policies that a polity will pursue, voters choose which candidates (or more likely group of candidates in the form of political parties), they trust to legislate and/or execute laws. There exist various grounds on which voters can base their choice including perceptions of competence or ideological affinity. However, while representative democracy is increasingly recognised as the dominant mode of collective decision making, that does not imply either a historic or contemporary acceptance of its universal validity. Its original emergence challenged prevailing notions of democracy and its contemporary growth continues to pose questions as to what modern democracy is and what it represents. The following couple of sub-sections will attempt to frame just what some of those issues are.

Intro:3:1:1 A violation of democracy?

The ancient form of decision making known as direct democracy was evident in early city states such as Athens.[40] Such a system involved the making of collective decisions by the entire citizenry and subsequently is often perceived as being impractical in the large and complex modern states that exist today. The adoption of such a perspective while implying the necessity for some form of representative government is based on concerns related to convenience and efficiency rather than democratic principle.

> "It was seen as the practical expression of a simple reality: that it wasn't feasible for all of the people to be involved all of the time, even if they were so inclined in the business of government."[41]

[39] Martin Loughlin, *The Idea of Public Law*, Oxford University Press, 2003, 53
[40] John Keane, *The Life and Death of Democracy*, Simon and Schuster, 2009
[41] Ibid, xix

The question that needs to be asked is whether representation is compatible with or supportive of democracy in substantive terms or is it simply a necessary and convenient procedural dilution of the principle of collective self government?[42]

In terms of fundamental principle, the concept of representation has been criticized as a violation of democracy for two main reasons. Firstly, it has been contended that as democracy entails 'choosing for oneself among alternative options for collective choice' then the move from direct to representative government represents 'the transformation of the citizen from direct legislator to conferrer of consent upon the choices of others.'[43] Secondly, it is argued that as representative parliaments are 'arenas of contestation', they impede the 'homogeneity of values' necessary for the effective formation of a democratic will.'[44]

Both of these criticisms are based on invalid assumptions. Firstly, the idea that Athenian democracy offered a 'perfect' example of democracy in action is mistaken. Not only does it ignore the fact that both women and slaves were denied citizenship and were thus barred from the processes of collective deliberation[45], but also that random procedures such as lottery and rotation were used to install holders to executive office. The existence of such procedures implies that the main difference between representative and direct democracy lies not in the number of people chosen to govern but their method of selection. As Bernard Manin has argued

> 'What makes a system representative is not that a few govern in the place of the people but that they are selected by election only.'[46]

Consequently, representative democracy can be justified epistemically. Firstly, it can be argued that the electoral process underlying representation incentivizes responsive

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[42] While referenda are used occasionally-the most obvious example being the Scottish Independence referendum this year, they are usually used to confer consent or otherwise on changes on how exactly the people's views are to be represented

[43] Andrew Levine, *Liberal Democracy: A critic of its Theory* ,Columbia University Press, 1981, 150

[44] Carl Schmitt, *The Crisis of Parliamentary Democracy,*1923 published by MIT Press, 1988 referenced in Frank Cunningham, *Theories of Democracy: A critical introduction,* Routledge, 2002, 91

[45] John Keane, The Life and Death of Democracy, Simon and Schuster, 2009

[46] Bernard Manin, *Principles of Representative Government*, Cambridge University Press, 1997, 41

decision making in that those who make the decisions must take account of the wishes of their electorate. Also, and in minor qualification of the previous point, it can be contended that the more distant nature of representative government is more likely to produce responsible decisions as it allows a balance to be struck between decisions that are popular in the short term and those which are responsible in the longer term.

> "If political responsibility…is a virtue then it could be said that one of the functions of representation-and one of its advantages over direct democracy-is that it gives its political leaders the distance from immediate public pressures that is needed if they are to act in a consistent and prudent fashion."[47]

Next, the idea that any modern nation state has a single popular will that can be ascertained and implemented by government wilfully ignores the incontestable fact that contemporary societies contain a number of competing interests and preferences. Representative democracy constitutes a procedural recognition not only of the existence of substantive diversity but that the fundamental disagreements which are its inevitable consequence can only be accommodated and contained if they are given the opportunity to be expressed.

> ' …democracy in representative form reject[s] the presumption that disagreement [is]undemocratic, that ideally its body politic should be indivisible…It [is] a type of polity that encourage[s] the public airing of differing interests and opinions, as well as their handling through leadership guided by merit.'[48]

Such a system of government requires mechanisms that reflect and allow expression of the disagreements intrinsic to modern societies. One of the most vital of these mechanisms is the institution of the modern political party. The precise and detailed role that parties play facilitating representation will be discussed towards the end of this introductory chapter. However, their simple existence as 'intermediate institutions

[47] Anthony.H. Birch, *Concepts and Theories of Modern Democracy*, 2nd Edition, Routledge, 2001, p101
[48] Keane, Op cit, 163

between the individual citizen and the state'[49] throws up fundamental questions regarding the role and responsibilities of an elected representative.

Intro:3:1:2 The Nature of Representation

> "Should a member of the legislature be bound by the instructions of his constituents? Should he be the organ of their sentiments, or of his own? Their ambassador to a congress, or their professional agent, empowered not only to act for them but to judge for them what ought to be done?"[50]

The above quotation effectively encapsulates an inherent dilemma of representative democracy. This dilemma has been termed as the 'mandate/independence controversy'.[51] Effectively, the controversy is reducible to the question of whether 'elected representatives should function as 'delegates' or 'trustees' for those who elected them.'[52]

Those who argue in favour of independence contend that the idea of a legal or moral mandate for legislators is misplaced for both instrumental and normative reasons. Firstly, in instrumental terms, such a mandate would hinder the quality of or even negate the need for deliberation within a legislative setting by effectively forcing elected representatives to vote in a way that either their constituents or party demanded.[53] Secondly, it ignores the reality that the laws made by representatives are binding on all citizens within a polity and therefore at some level, legislators represent the entire polity and not just those who reside in the constituencies which elected them.

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[49] Ingrid Van Beizen, 'How Political Parties Shape Democracy', (2004) at UC Irvine Center for Study of Democracy found at http://escholarship.org/uc/item/17p1m0dx
[50] John Stuart Mill, *Considerations on Representative Government,*(1861) reprinted in L.Geraint (ed) *John Stuart Mill: On Liberty and Other essays,* Oxford University Press, 1991, 373
[51] Hannah Pitkin, *The Concept of Representation,* University of California Press, 1967. 145
[52] Cunningham, Op cit, 92
[53] Nadia Urbinati, 'Continuity and Rupture: The power of Judgement in Democratic Representation' in *Constellations,* Volume 12(2), 2005, 194-222

> "…we cannot bypass the point of view of the "will of the people" and stress only the relationship between the representative and her constituency…the *particular* and the *general* are both constitutive of democratic representation."[54]

This view contends that legislators should take into account the preferences of a variety of groups and individuals which include not only the constituents they geographically represent and the party on whose platform they were elected but also the wishes of the wider polity as well as their own independent judgement. This very existence of differing and competing preferences produces in epistemic terms a sharing of insights between the representative and the electorate that result in a more comprehensive and inclusive process of deliberation.

> "Political representatives recognize the existence of competing and general interests alongside those of their constituents. And they consider whether their constituents' choices are the best way to get what those constituents want. In political representation dialogic elements between principal and agent expand, as does the latter's room for manoeuvre."[55]

Such a view is not universal. Adherents to a mandate model such as Thomas Christiano, whilst acknowledging that elected legislatures should be arenas of deliberation, contend that such deliberation should be limited to ways in which the pre-determined goals of the electorate can be met.

> "Legislative representatives should engage in far-reaching deliberation about *means* to socially determined ends, but that with respect to ends themselves, they should act as citizens' delegates."[56]

This raises the question as to which section of the citizenry a representative should act as a delegate for. Given the existence of fundamental disagreement within society,

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[54] Ibid, 196
[55] David Plotke, 'Representation is Democracy' in *Constellations*, Volume 4(1), 1997, 29
[56] Thomas Christiano, *The rule of the many: Fundamental Issues in Democratic Theory*, Westview Press, 1996, 216-219 as described in Cunningham, Op cit, 94

any decision taken by elected representatives will inevitably privilege the views of one or some sections of society over others. Christiano believes that a representative should follow the wishes of those who directly voted for him or her. Political parties are in themselves an enhancing feature of such a representative role.

> "Assuming that it is clear what the mandated end is, it will also be clear…that representatives should be responsible to those who voted for them to carry out that mandate. This is feasible in practice…if people vote for political parties, each running on platforms that conform to alternative ends, and if seats allocated to a legislative assembly are proportional to the percentage of votes received by each party."[57]

The arguments surrounding the independence/mandate controversy are at least partially illustrative of the continuing existence of fundamental disagreement. Those who argue in favour of independence recognise that a diversity of interests and preferences continue to exist beyond their temporary expression at the ballot box and that individual legislators should take that diversity as well as their own conscience into account while engaging in deliberation. Conversely, those who align themselves with the mandate thesis argue that once an election has occurred, while the elected chamber should and will inevitably remain an arena of contestation and deliberation, the contribution of an individual legislator to that process is to faithfully represent the views of the section of the electorate that put them there. This latter argument views representative democracy as a modern expression of the wishes of the people and elected legislatures as vehicles of articulation of the popular will. As we shall see, it is doubtful whether the modern electoral form of democracy attains this goal to any effective degree.

[57] Cunningham, Ibid describing the attitude exemplified in Ibid, 227-229

Intro:3:2 Popular Sovereignty

The principle of popular sovereignty is also intrinsic to contemporary notions of democracy. It envisages groups of 'free and equal' citizens uniting together to enact rules or laws which will advance or provide for the general welfare. These rules are legislated for and executed by the people through their representatives who are selected through a regular and competitive electoral process. It is this form of electoral accountability that ensures that the rules and laws enacted reflect the will of the people.[58]

> "The legal order…a structure of rules which imposes constraints and restrictions on what otherwise would be an individual's unbounded freedom of action…is thus justified on the ground that to all intents and purposes, it is a set of laws that the people have given themselves."[59]

The conception of a 'people' as an entity that can express its collective will through the making of laws was famously articulated by Rousseau in the 18th Century.[60] Rousseau argued that the incorporation of an individual into a collective identity would leave them 'as free as before'[61] as long as they had the opportunity to participate in the formation of the general will.[62] However, while the formation of such a will may have seemed a relatively simple proposition in the small, homogenous communities idealised by Rousseau, it is an infinitely more complex undertaking in the vast, heterogeneous societies that exist today. Contemporary conceptions of popular sovereignty must therefore provide answers to two basic questions. Firstly, who are the people and secondly, what is it that they are actually deciding upon.

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[58] Martin Loughlin, 'Rights, Democracy and Law' in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights,* Oxford University Press, 2001, 42
[59] Ibid
[60] Jean Jacques Rousseau, *The Social Contract,* (1762) translated and edited by Victor Gourevitch in *The Social Contract and other later Political writings,* Cambridge University Press, 1997
[61] Ibid, 24
[62] Ibid

Intro:3:2:1 Who are the People?

If democracy is to be at least partially defined in terms of popular sovereignty, in that the people rule, the idea of ruling implies both an object and a subject.

> "Hence, the rulers in a democracy, the people are also the ruled...So the meaning of the word 'democracy' can be given…as being that the people rule themselves."[63]

Defining who 'the people' are is not a simple task. As Sartori has pointed out, the simplest definitions are neither applicable nor desirable.[64] For example, defining the people in terms of an entire polity ignores the reality that all democracies exclude specific groups of people such as minors and non-citizens from the right to vote.[65] At the other extreme, to define 'the people' as simply a collective entity or an organic whole endangers the individual freedoms central to democratic government.

> "From the people as an organic whole it can easily be inferred that each individual counts for nothing; in the name of the whole, each and all can be crushed one at a time, and behind the formula "all as a single one" we glimpse the justification of totalitarian autocracies, not of democracies."[66]

Given the size and complexity of modern democracies and the corresponding existence of a myriad of competing interests and preferences, the idea of a unanimous popular will is utterly unworkable. A more nuanced and realistic approach entails the adoption of a collective decision procedure which recognises the existence of substantive disagreement but provides a mechanism for at least its temporary resolution. The procedural paradigm adopted by most democracies is to extol the principle of majority rule as expressed through the mechanism of regular and competitive elections. Majority rule is often justified on the basis of a conception of equal respect. Firstly, it is effectively neutral between persons in that everyone's' vote is counted equally irrespective of either their status or whether their motives are

[63] Ross Harrison, *Democracy,* Routledge, 2003, 3
[64] Giovanni Sartori, *The Theory of Democracy Revisited*, Chatham House, 1987, 22-24
[65] Ibid, 22
[66] Ibid, 24

selfish or ameliorative.[67] Majority Rule is also neutral between change and status quo in that it is 'positively responsive' meaning that 'a collective choice in favour of an alternative [is] more likely as opinion moves in favour of that alternative.[68] Therefore, in attempting to answer the question 'who are the people', contemporary democracies define the popular in popular sovereignty as consisting of a temporal and therefore changeable majority. The next logical question which is left unanswered by such a definition is just what exactly do 'the people' have choice over?

Intro:3:2:2 What are 'the people' choosing?

Again in reference to the size and complexity of modern democracies, it is widely accepted that the general populace do not have either the time or capacity to make direct decisions on every issue of collective importance. Despite there being periodic occasions where specific issues, most notably those of constitutional significance[69] are decided by the people directly through the use of referenda, the primary function of the electoral process in the modern era is the installation of candidates to executive and legislative office whilst providing the citizenry a degree of choice in doing so.[70] Two other inextricably linked roles that Richard Katz attributes to the electoral process are the conferral of legitimacy upon office holders and the fostering of popular representation. [71] These functions are clearly based upon the notion that officials are empowered by the public to act 'for them, or in their place.'[72] The centrality of this relationship is an essential component of democracy.

> "Unless officials are representative in this minimal sense, the resulting government can make no claim to be democratic. Elections are the institutions by which the represented authorize their representatives to act for them, so no system can be democratic without elections."[73]

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[67] Richard Katz, *Democracy and Elections,* Oxford University Press, 1997, 100
[68] K. May 'A set of independent, necessary and Sufficient conditions for Simple majority decision', in *Econometrica*, Vol 20, 1952 referenced in Albert Weale, *Democracy*, McMillan Press, 1999, 129
[69] Modern examples from include United Kingdom Accession to EEC (1972) and Scottish Devolution (1997) and the upcoming vote on Scottish Independence (2014)
[70] Katz, Op cit, 100-106
[71] Ibid, 101-02, 104-05
[72] Ibid, 104
[73] Ibid

Political parties are unquestionably a necessary mechanism in this process and as is the case with their function of articulating a diversity of preference, their role in the aggregation of a 'popular will' will be discussed later. Despite the role played by parties in the aggregative process, or even partially because of it, modern representative elections are an imprecise mechanism. Rather than accurately reflecting the popular will over a range of issues, elections function '… merely to give the people a choice between alternative conceptions of the public interest.'[74] The dominant contemporary institutional expression of popular sovereignty can therefore be characterized as merely a temporal view of the majority on which group of candidates in the form of a political party are offering policies and solutions consistent with their conception of the common good. However, the actual outcomes produced by modern elections cast fundamental doubts on whether even this diluted conception of the popular will can be consistently attained.

Intro:3:2:3 The myth of Majority Rule

As has already been indicated, the representative nature of modern democracies and the subsequent absence of direct referenda make it practically impossible to ascertain whether a specific policy has majority support at the time of implementation. Majority rule is therefore primarily defined in reference to the allegiance voters have to the 'highly aggregated alternatives offered by political parties'.[75] Even within this qualified paradigm, it is doubtful whether majority rule is ever truly achieved. Even if one were to ignore the growing evidence of low voter turnout in elections[76], it is doubtful whether modern elections even give an accurate translation of the party preferences of those who do bother to vote. Recent research shows[77] that only rarely is a governing majority correspondent with the preferences of the majority of electors. For example, in the cases of countries with single member constituencies, governing majorities were produced by a plurality rather than a majority of voters by an almost

[74] Katz (1997) Op cit, 35
[75] Phillipe C. Schmitter and Terry Lynn Karl ' What Democracy is…or is not' in Larry Diamond and Marc F. Plattner, *The Global Resurgence of Democracy*,(2nd edition), John Hopkins University Press, 1996, 52
[76] Michael Zelenko 'Democracy in Decline' (Autumn 2012) available at www.worldpolicy.org/journal/fall2012/democracy-decline
[77] Michael D. Mcdonald, Silva M.Mendes and Ian Budge, 'What are Elections for? Conferring the Median Mandate' in *British Journal of Political Science,* Volume 34, 2004, 1-26

six to one ratio.[78] Alternatively, in countries with more proportional systems, while a governing majority was produced by the preferences of the majority of the electors in more than half the cases; this was overwhelmingly in the form of coalition government. As coalition governments are almost always produced by 'bargaining between parties'[79] after the election, it is very likely that the subsequent governing majority is 'not one created by the voter's expressed preferences." [80] The creation of a governing majority helps perpetuate the myth that the policies of elected governments represent an accurate barometer of the public will. It is contended, therefore, that the contemporary equation of popular sovereignty with rule by the majority is mistaken on an evidentiary basis. At a more fundamental level, it can also be argued that in its contemporary identification with the implementation of the preferences of an alleged majority that an unqualified commitment to popular sovereignty potentially threatens other values fundamental to democracy.

Intro:3:2:4 A threat to Democracy?

At a fundamental level, the principle of majority rule inevitably places the interests of those in the majority ahead of those of the entire polity. Stanley Benn has argued that while a practical application of such a principle would oblige an elected government to legislate for the policies it promised the electorate at the ballot box,[81] a more sinister corollary of such a view would be to infer that as a new government is representative of the popular will, then it would be undemocratic to oppose or attempt to impede their actions.[82] Such a situation, it can be argued, threatens the rights of those who find themselves in a minority.[83]

> "…it is only a short step from proclaiming the sovereignty of the people to claiming the unlimited authority of its elected representatives, to proscribing opposition, and to denying

[78] Ibid, 5-7
[79] Ibid, 10
[80] Ibid
[81] Stanley Benn 'Democracy' in *Encyclopaedia of Philosophy*,ed. Paul Edwards, 1967 available at www.ditext.com/benn/democracy.html
[82] Ibid
[83] Sartori, Op cit, 24 and Jack Donnelly, *Universal Human Rights in theory and practice* (Cornell University Press 2003) 191

> individuals any rights other then those which the government with majority support deems fit."[84]

Contemporary examples of such violations have been documented by academics such as Steven Levitsky and Lucan Way[85] in relation to countries such as Milosevic's Serbia and Putin's Russia where it is argued that the legitimizing instrument of elections co-exist with violations of the 'minimum criteria' of democracy such as rights of expression and association. These occur with such frequency that they 'create an uneven playing field between government and opposition.'[86] Other critics go further. Sartori argues that an unrestrained commitment to majority rule will not only threaten the rights of a temporal minority but potentially the continued existence of democratic government altogether. Such a contention has clear historical antecedents in the form of Nazi Germany.

> "Establishing the absolute right of the majority to impose its will on the minority, or minorities amounts to establishing a working rule that works, in the longer run against the very principle that it extols. If the first winner of a democratic contest acquires unfettered …power, then the first winner can establish itself as a permanent winner. If so, a democracy has no democratic future and ceases to be a democracy at its inception; for the democratic future of a democracy hinges on the convertibility of majorities into minorities and, conversely of minorities into majorities."[87]

These criticisms betray a concern that while the existence of an electoral mechanism as an expression of the popular will is undeniably a central requirement of any polity aspiring to the status of a democracy, a narrow emphasis on electoral outcomes potentially undermines as well as upholds other essential democratic values. Firstly, while elections uphold the principle of representation by affording the electorate the opportunity to choose who will make decisions for them, it is also evident that

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[84] Benn, Op cit
[85] Steven Levitsky and Lucan A. Way, 'The rise of Competitive Authoritarianism' in *Journal of Democracy*, Volume 13(2), 2002
[86] Ibid, 53
[87] Sartori, Op cit

electoral outcomes rarely express a majority of popular preferences in relation to either the composition of government or the policies that such a government may implement. Secondly, while the existence of elections offer the prospect of change and their procedural operation is based on the concept of an equal citizenry, an unconstrained commitment to respect electoral outcomes potentially poses immense practical and theoretical challenges to the principles of equal respect and changeability. The next two sections of this chapter will attempt to elucidate these principles and analyse their implications both in respect of each other and with regard to both representation and popular sovereignty.

Intro:3:3 Equal Respect

To claim that political equality is a necessary condition of democracy is to make a statement which would be considered by many to be self evident. What such a statement does not illuminate, however, is the question of what political equality actually does or should consist of in practice. As was contended earlier this chapter, what it clearly does not denote is a commitment to equality of welfare or an equal satisfaction of interests. Such a goal while representing a legitimate aspiration and arguably a legitimate outcome of the processes of deliberative and electoral processes is not intrinsic to democracy as a system of governance. To define democracy in such terms would be to remove the substantive disagreement that necessitates collective decision making in the first place.

> "Democracy is a method for making collective decisions in which everyone has an equal right to play a role…the principle of equal well being is not concerned by the *method* by which decisions are made…Such equality of well being may be a good thing, but it is not the same as democracy…Again, to use a well worn illustration, equal well being is compatible with the institution of benevolent dictatorship."[88]

[88] Christiano, Op cit, (2002), 34

Given also that there are inevitable disagreements within a democratic society over both the form and outcomes of collective choice procedures, political equality in the guise of equal participatory rights has been characterized a 'fair compromise'[89] between those who are in disagreement. However, the notion of a fair compromise ignores the fact that a commitment to democratic decision making inevitably privileges the specific preferences of those who already favour it.

> "…it is not true that giving each an equal say will constitute any compromise at all; the democrats will have their way while the aspiring oligarchs will get nothing. The fair compromise in this case should be some mix of democracy and oligarchy."[90]

Again as previously discussed, the procedural equality inherent within democracy is based upon the notion that each individual citizen has an equal opportunity to have their interests and preferences considered. On a practical level, this requires not only an equal opportunity to influence collective choices through the mechanism of the vote but also rights of association and expression which facilitate arenas of collective deliberation necessary to allow the casting of votes to be based on informed preferences.

Intro:3:3:1 Equality and Majority Rule

As has already been indicated, the system of majority rule prevalent in contemporary democracies can be defended on egalitarian grounds in that it establishes an equal right to vote and attributes equal weight to that vote regardless of motive or status. Systems of majority rule therefore exemplify a commitment to equality of input or procedure or what has already been termed an 'equal consideration of interests.'[91]

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[89] Peter Singer, *Democracy and Disobedience,* Oxford University Press, 1974

[90] Thomas Christiano, 'Freedom, Consensus and Equality in Collective Decision Making' in *Ethics,* Volume 101(1), 1990, 174 referencing and discussing the ideas of Singer, Ibid, 36

[91] See Robert. A. Dahl 'Procedural Democracy.' in Peter Laslett and James Fishkin(eds), *Philosophy, Politics and Society*, 5th ser.. New Haven, Conn.: Yale University Press, 1979, pp. 97-133 and Peter Jones.' Political Equality and Majority Rule' in David Miller and Larry Siedentop, (eds), *The Nature of Political Theory,* Oxford: Oxford University Press , 1982,pp. 155-82
This view has been challenged on the grounds that certain groups of people are excluded from the democratic process. Examples include the formal exclusion of non-citizens within a polity who are subject to laws they have no opportunity to help formulate and the socially and economically marginalized whose relative disadvantage hampers an effective utilization of their formal political

Despite its concern with a procedural equality of input, the logic underlying majority rule will result in choices premised on inequality. By its very name, majority rule privileges the interests and preferences of those who consist of a majority over those who reside within the minority. On a fundamental level, therefore, the outcomes produced by majority rule are likely to have 'inegalitarian implications.'[92] While inequality of political outcomes may be undesirable from the standpoint of social harmony, they are inevitable given the existence of disagreement. As Harrison has noted

> "Some people, it is true, do not have control. This, however, is a cost which has to be paid if we are to have any government at all."[93]

From both a democratic and egalitarian standpoint, a major concern regarding the inevitability of inequality in political outcomes is that they may be utilized to remove or undermine the procedural equality inherent to majority rule. Such a process could remove the very basis of democratic governance itself.

> "…democracy means that the people govern themselves each as a full partner in a collective political enterprise so that a majority's decisions are democratic only if certain further conditions are met that protect the status and interests of each citizen as a full partner in that enterprise."[94]

Those further conditions are often given moral and legal expression in the concept of enforceable rights.

Intro:3:3:2 Equal Rights and Democracy

The concept of individual rights is premised on equality. The Universal Declaration of Human Rights opens with 'recognition of the inherent dignity and of the equal and

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opportunities. For Example see- Kevin Olson 'Popular Sovereignty, Inclusion and reflexive democracy' paper presented at American Political Science Association, 2006

[92] Ross Harrison, *Democracy*, Routledge, 1993, 179

[93] Ibid, 195

[94] Ronald Dworkin, *Is Democracy possible here?*, Princeton University Press, 2006, 131

inalienable rights of all members of the human family.'[95] Proponents of a principle known as either 'equal concern' or 'equal respect'[96] argue that the preferences of all individuals have a relatively equal moral worth and that, consequently, it is the responsibility of the State to ensure the continuing right of each individual to express those preferences. This requires not only the equal opportunity to influence collective choice procedures but also protection from collective choices which may threaten or undermine those equal opportunities. These protections are to be given institutional expression by the observance of a system of individual or minority rights.

> "…democracy conceived as a majority rule limited by minority rights corresponds to the people in full, that is, to the sum total of majority plus minority. It is precisely because the rule of the majority is restrained that *all* the people…are *always* included in the demos."[97]

The crux of this argument is that in order to ensure that all citizens are given a voice then the enforcement of collective preferences must be limited to allow for the continued participation of those who may find themselves in a minority. Those who advocate individual rights as a means to that end contend that at the very least, this requires a commitment to political rights such as freedom of expression and association which are viewed as being both necessary to and contingent upon the continuation of democratic government.

> "…that it is true that the rights of liberty have been from the beginning the necessary condition for the correct application of the rules of the democratic game, it is also true that the development of democracy has become successfully the principal instrument in the defence of the rights of liberty."[98]

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[95] Universal Declaration of Human Rights, (1948), Preamble
[96] Dworkin Op cit also see Ronald Dworkin ' Liberalism' in Stuart Hampshire (ed), *Public and Private Morality*,(Cambridge University Press) 1978
[97] Sartori, Op cit
[98] Norberto Bobbio, *Liberlismo et Democrazia* Franco Agneli:Milan 1985 48 translated and quoted in Corina Yturbe, 'On Norberto Bobbio's theory of democracy' in *Political Theory*, Volume 25(3) , June 1997

From the perspective of liberal democracy, other theorists go further. In *A Theory of Justice*[99], John Rawls identifies two principles of Justice which rationally self interested individuals[100] would choose from behind a veil of ignorance.[101] From the perspective of democracy, the first principle is the most relevant.

> "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."[102]

While acknowledging the existence of a wide variety of differing conceptions of the good[103], Rawls asserts that his system of equal basic liberties by allowing for both rational dialogue and equal respect will facilitate the emergence of an 'overlapping consensus… of reasonable religious, philosophical and moral doctrines in a society regulated by it' to which holders of divergent conceptions of the good can adhere to.[104]

The specific rights that such a 'reasonable' consensus may yield are given expression in the writings of Ronald Dworkin. Dworkin dismisses the majoritarian form of democracy which he views as a merely procedural mechanism in favour of a conception described as 'partnership democracy'[105]that is seen as being integral to human dignity. Dworkin argues that while human dignity requires individuals, by the act of voting, to be equal partners in the making of binding collective choices, it also requires that certain rights remain out with collective control and be a matter of individual autonomy. At the very least, these include not only the basic rights of political participation but also the right to life, rights of protection against torture or cruel and inhuman treatment and freedom of thought, conscience and religious belief. Dworkin also argues that due to their legal training and ability to engage in moral reasoning, these rights should be constitutionalized and placed in the interpretive hands of the judiciary.

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[99] John Rawls, *A Theory of Justice* ,revised edition,(Oxford University Press), 1999
[100] Ibid, 453
[101] Ibid, 118-123
[102] Ibid, 220
[103] John Rawls, *Political Liberalism*, (Columbia University Press), 1993, 36
[104] Ibid, 10
[105] Ronald Dworkin,2006, Op cit,

> "We may better protect equal concern by embedding certain individual rights in a constitution that is to be interpreted by judges rather than by elected representatives, and then providing that the constitution can be amended only by supermajorities."[106]

In pursuit of the goal of equal concern or respect, liberal theorists defend justiciable individual rights as a mechanism for placing limitations on the collective outcomes and potential inequalities that electorally produced majorities can enforce. In opposition to this view, it is possible to contend that the utilisation of such means for the protection of equality goes beyond not only the placing of reasonable limitations on the outcomes of popular sovereignty but also transgresses the very concepts of equal respect and changeability upon which their adoption is premised.

Intro:3:3:3 The trouble with rights

Firstly, while the desire to protect equal participatory rights for all from their potential revocation by a temporal majority is a noble goal, it remains unclear why, in this regard, a democratic polity should privilege the judgements of an unelected judiciary ahead of the populace and their elected representatives. The adoption of such a position not only represents a qualification of the principle of *popular sovereignty* but a comprehensive violation of it. As even a prominent supporter of the mechanism of judicial review, Alexander Bickel, has argued, its deployment presents supporters of democracy with what he describes as a counter-majoritarian difficulty.[107] The striking down by an unelected court of legislation emerging from a popularly elected chamber not only 'thwarts the will of the representatives of the actual people of the here and now',[108] it also indicates that power is being exercised '…not on behalf of the prevailing majority but against it.'[109]

Secondly, the constitutionalization or legal entrenchment of rights at least partially negates the existence of disagreement which makes the existence of majority rule

[106] Ibid, 144
[107] Alexander Bickel, *The Least Dangerous Branch*, 2nd Edition, (Literary Licensing LLC), 2011
[108] Ibid
[109] Ibid

necessary in the first place. As Jeremy Waldron has argued[110], there exists enough broad and legitimate disagreement over what constitutes justice to invalidate any attempt to establish a coherent moral justification for constraining the outcomes of majoritarian procedures by judicial review. In a democratic society, there exists massive controversy as to which rights should be protected[111]and how specific rights should be interpreted.[112] Constitutionalization or the legal entrenchment of rights is suggestive of a consensus that more than likely does not exist.

> "…we cannot say…that the whole point of rights is to 'trump' or override majority decisions. For rights may be the very issue that the members of the society are disagreeing about, the very issue they are using majority voting to settle."[113]

Next, this chapter has previously argued that it is mistaken to base a moral justification of democracy primarily on its tendency to produce substantive outcomes whose desirability is subject to contestation. Consequently, given the existence of fundamental disagreement concerning both the importance and content of specific rights, the establishment of a system of judicially created rights which are enforceable against popularly enacted legislation is potentially iniquitous. The entrenchment of specific rights amounts to the effective exclusion of those who disagree with the values underpinning such rights from the ability to influence relevant areas of public policy. Such exclusion in the pursuit of an artificial consensus can be classified as constituting an effective denial of equal respect. To go further, the placing of interpretive power in the hands of an unelected judiciary indicates an attitude towards the electorate and their representatives which is fundamentally inconsistent with the concept of equal respect upon which the idea of individual rights is premised.

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[110] Waldron, Op cit, n30- See also David Estlund 'Jeremy Waldron on Law and Disagreement' in *Philosophical Studies,* Vol 99, 2000, 111-128

[111] For example – the right to bear arms within the 2nd Amendment to the Constitution of the United States (1791)

[112] For example – the right to life throws up huge controversies surrounding issues such as Abortion and Euthanasia

[113]Jeremy Waldron, 'A right based critique of Constitutional Rights' in *Oxford Journal of Legal Studies,* Volume 13(1), 33

> "…there is a certain tension-perhaps even a poignant contradiction-in arguing that we require decisions about the nature of rights to taken out of the hands of legislators or of the people as a whole, by virtue of the fact that we cannot trust them to act responsibly-that is, with the gravity and concern for humanity that provided the justification for considering people to possess rights in the first place."[114]

Finally, to entrench specific rights is to place them beyond popular revision. Such a process invalidates one of the central purposes of democratic decision making since ancient Athens[115] which has been to modify law in order to improve society and promote the common good. While entrenchment of individual rights may arguably serve a 'constitutive purpose' …such as the protection of 'the conditions of democratic decision making'[116], it can also simultaneously act as a means of 'preserving privileges and power asymmetries.'[117], therefore threatening not only political equality but also the democratic principle of changeability.

Intro:3:4 Changeability

> "When democracy takes hold of people's lives, it gives them a glimpse of the contingency of things. They are injected with the feeling that the world can be other than it is-that situations can be countered, outcomes altered, people's lives changed through individual and collective action."[118]

A fundamental inspiration underlying democratic participation is that of *changeability*. The idea that peoples' lives and prospects can be improved on both an individual and collective level has acted and continues to act as a powerful motivation for activity within the democratic process. This section will concentrate on two

[114] Melissa Schwartzberg, *Democracy and legal change,* Cambridge University Press, 2009, page no?
[115] Ibid, 69-70
[116] Ibid, 2
[117] Ibid
[118] Keane, Op cit, 855

aspects of change which it is argued are fundamental to the democratic process. Firstly, the opportunity that elections provide for a government to be removed by its people and replaced by a more popular alternative will be briefly discussed. Secondly, and more fundamentally, the opportunities for legal change which electoral mechanisms provide will be analysed from a democratic perspective.

Intro:3:4:1 Change in Government

The most obvious change that elections allow for is a change in government. Western democracies periodically allow their citizens the opportunity to remove those in office from power. As previously discussed,[119] it is doubtful whether representative elections accurately reflect the will of the people on specific issues. What they do allow the citizenry, however, is an opportunity to pass judgement on those in office by either renewing their mandate or replacing them with alternative leaders or groups. The possibility of removal behoves those elected to office to pay at least cursory attention to the views of the electorate.

> "…democracy strives to control winners…by offering real incentives to losers. Democracies introduce a strong element of randomness in the patterns of winning and losing. They ideally require that individuals and whole groups are sometimes winners, sometime losers. Democracies therefore thrive on the selection of those who decide matters of government and civil society through free, fair and frequent elections…"[120]

The prospect of change that democratic elections offer, however, is not limited simply to a change in relevant personnel. They also allow for the possibility of a change in direction in both the specific policies implemented within and overall aims followed by a democratic polity. To give a couple of recent examples, while there is no doubt that the UK general election in 1979[121] and the US Presidential election of 2008[122] are historically noteworthy because of who they put in office, their real historical

[119] Section Intro:3:2:3
[120] Keane, Op cit, 861
[121] Election of Margaret Thatcher as first female Prime Minister
[122] Election of Barack Obama as first African American President

significance may be in the change of direction they signified in the priorities of the relevant polities.[123] It can therefore be argued that the most fundamental change that democracies offer its citizenry is not the regular rotation of leaders but fundamental economic and social changes at least partially achieved by relevant legislation.

Intro:3:4:2 Legislative Change

The idea of legislative or statutory change within a democracy normally denotes the modification of pre-existing rules through a majority decision reached within an elected legislature. Such a notion has been around for a while.

> "…the idea that an assembly can modify law in a deliberate (and a deliberative) fashion has been a critical feature of discussions of popular government for centuries."[124]

From both a philosophical and democratic perspective, the continuing availability of legal change can be asserted on the grounds of fallibility and legitimacy. With respect to fallibility, the availability of legal change was defended by earliest legal philosophers on the grounds that while the natural law emanating from a divine creator is eternal and unchangeable, law created by humans is, by contrast, temporal and changeable because 'human reason is mutable and imperfect.'[125]

From a modern perspective, the 'grounding of a defence of flexible law'[126] on the basis of human fallibility has been defended by Melissa Schwarzberg. She argues in opposition to Dworkin and Sartori that such a contention is more respectful to minorities than the institutionalization of a judicially enforceable set of legal protections.

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[123] The election of Thatcher signified the end of the Keynesian Post War Economic consensus in Britain and allowed policies such as privatization to be introduced which signalled a return to *laissez-faire* economics at the expense of government intervention. This shift in direction was continued by subsequent governments including those of a different political hue. See Simon Jenkins, Thatcher *and Sons,* 2nd Edition, Penguin, 2007. While it is clearly too early to pass judgement on the long term effects of the Obama presidency, the excitement generated by his election was not only attributable to his race but to the possibilities of change his election opened with regard to (to give a couple of examples) American Foreign Policy and health care reform.
[124] Schwarzberg, Op cit, 4
[125] St Thomas Aquinas, *Treatise on Law*, translated by Richard.J. Regan, Hackett Publishing, 2000, 63
[126] Schwarzberg, Op cit, 203

> "…that the law may be wrong not only signals to the minority that it is potentially revisable, but that through argumentation, they may be able to persuade the majority of the rightness of their views. Indeed, the commitment to fallibility may indeed reflect a norm of equal respect more closely than the entrenchment of rights designed to enshrine such respect."[127]

It is also opined that the opportunity for an outvoted minority to revisit decisions and potentially change them gives the process a degree of democratic legitimacy. This view is premised on a conception of democracy which reveres both debate and contention and views majority rule as a mechanism by which collective decisions are made on the presumption that deliberations surrounding these decisions can be resumed at a later time. As Schwartzberg again puts it

> "The legitimacy of democratic decisions… requires that [they] emerge from a deliberative process open to all, which, by virtue of the nature of the 'indeterminacy of justice' and the need for a decision, must be concluded. Its enduring validity, however, depends upon the capacity of the minority to reopen debate at some point in the future and to try again to persuade the majority of the correctness of their perspective."[128]

Intro:3:4:3 Change as a threat to Democracy

Logically, however, there can be no guarantee that the changes implemented by newly elected legislatures will be fair or just. As a result, concerns expressed with regard to the principle of *changeability* echo those surrounding *popular sovereignty.* An unconstrained commitment to *changeability* potentially threatens democratic procedures in exactly the same ways as a similar commitment to *popular sovereignty.* The concern expressed by critics of a purely procedural approach is that electorally

[127] Schwarzberg, Op cit
[128] Schwartzberg, Op cit, 204

successful political movements will be able to (in the absence of legal limitations) use the freedoms inherent within democracy to revise not only the policies followed by previous democratically elected governments but also remove the minimum conditions for continued democratic decision making.

> "… a specified list of individual rights should be made immune to revision. This list should include, first and foremost, rights that are indispensible to democratic legitimacy."[129]

The logic underlying a call for entrenchment of such rights is that because procedural justifications of democracy display a dangerous ambivalence towards democratically produced outcomes which may threaten the continuation of procedural equality, there is a necessity to impose substantive limits on democratically produced outcomes in order to protect the fairness intrinsic to democratic procedure. Protecting procedural equality is perceived as being vital to the continuing availability of the processes of representation and popular sovereignty which while imperfect are intrinsic to the continuing availability of substantive disagreement and thus change. In essence, limits have to be placed on changeability to protect its continuing availability.

Intro:3:5 The Four Principles and Disagreement

It is evident that the four principles discussed above are intertwined in a relationship that is mutually reinforcing and yet simultaneously challenging and potentially threatening. With regard to their reinforcing characteristics, perhaps their most significant common thread is their contribution to the continued existence of substantive disagreement which is central to the epistemic quality of democratic decision making. To elaborate on earlier themes: Representative democracy constitutes a procedural recognition of the impossibility of unanimity given the complexity of interest and preference prevalent in modern polities. Those interests and preferences are afforded consideration within the system by the existence of equal political rights such as freedom of expression and association which allow the citizenry to continually influence the processes of collective deliberation and through

[129] Stephen Holmes and Cass Sustein, 'The Politics of Revision' in Sanford Levinson (ed), *Responding to Imperfection*, Princeton University Press

the right to vote where citizens directly contribute to collective choice procedures. While it is true that elections as the primary instrument of popular sovereignty provide a means for the temporary resolution of substantive disagreement, the relatively regular incidence of elections signify to those unfortunate enough to find themselves within the temporal minority that a change in both government and legislative priorities continues to be attainable and it is the prospect of substantive change which serves as a motivation for continued democratic participation.

Despite their interdependence, it is also evident that an unqualified commitment to any one of these principles potentially threatens the continuing applicability of others and consequently the capacity for debate and disagreement depends in large part on the balance that is struck between them at any given time. A regular example of this is that many democracies through the mechanism of a written Constitution have established a set of judicially enforceable political rights such as freedom of expression and association. These can be viewed as an institutional invocation of the principle of equal respect which is designed to prevent the representative organs of popular sovereignty from implementing substantive changes which threaten the long term applicability of all four principles. However, there exists an alternative approach which while pursuing similar aims advocates the utilisation of radically different means. Instead of the overt invocation of the principle of equal respect, this approach pursues temporary dilution of it in order to ensure that specific democratic majorities are unattainable and consequently substantive outcomes judged to be deleterious to democracy are not only never implemented but are not even pursued. This specific dilution of procedural equality is centred on a radical restriction of the right of freedom of association in the form of prohibiting or dissolving political parties which are deemed to pose a specific threat to the democratic polity. The deployment of such a strategy is potentially highly contentious as it removes from the relevant polities, specific manifestations of vehicles in the form of political parties which are essential to the epistemic virtues of democratic decision making. The remainder of this chapter will discuss in general terms the legitimacy of such an approach. Firstly, it will acknowledge the importance of political parties to democracy generally and to the four principles previously identified. It will then proceed to address the question of when (if ever), it is justifiable for a democratic polity to prohibit or dissolve specific manifestations of such an essential democratic mechanism. It will argue that just as a

moral justification of democracy requires a balance between procedural and substantive elements, an appropriate response to the question of party prohibition necessitates a similar balance to be struck between procedural and substantive approaches which facilitate the retention of as much substantive disagreement as a democracy can be reasonably expected to stand.

Intro:4 Political Parties and Democracy

> "While political parties have been long neglected in the constitutions of western liberal democracies, in the post-war period their relevance for democracy became more widely acknowledged also in constitutional terms, to the point that pluralism, political participation and competition in many contemporary democratic constitutions have come to be defined almost exclusively in terms of party. Indeed, and despite their relatively recent appearance on the political stage, parties have put an extraordinarily strong mark on contemporary democratic politics, to the point that twentieth century democracy can be best described as 'party democracy'."[130]

1:4:1The Growth of Parties

From a practical perspective, the legal right of freedom of association is essential to modern democracy. The primary reason for this is that it allows for the formation of 'competitor parties' which are central to the opportunity for the citizenry of any polity to 'replace the party in government with a rival political association.'[131] This has not always been the case. Whilst the formation of rival political associations is often rendered illegal in non-democratic regimes, it has not always necessarily followed that the absence of political parties 'indicates a non-democratic system of government.'[132] As previously referenced, the form of government practiced in Ancient Greece [133] known as direct democracy expected individual citizens to directly

[130] Ingrid Van Beizen, Op cit, 6
[131] Ian Cram, 'Constitutional responses to extremist political associations- ETA, Batasuna and democratic norms' in *Legal Studies,* Volume 28(1), 2008, 68
[132] Ibid, 70
[133] John Keane, *The Rise and Fall of Democracy,* Simon and Shuster, 2009,3-78

participate 'in the legislative and judicial functions of the state'[134] in a manner that required the subordination of private interest 'to the pursuit of public functions and the general good of the community.'[135] The contemporary absence of such a system alongside the increasing dominance of representative forms of government can be primarily attributed to the (in historical terms) relatively recent growth of large scale political communities in the form of nation states. These new type of polities entertained an increasingly diverse array of economic and social interests and preferences. This not only made the direct and active participation of every citizen in all decisions impractical but also contributed to the emergence of associations which reflected that complexity of interest.[136] However, the emergence of these new vehicles of association was originally met with a degree of hostility by 18th century advocates of democracy. Philosophers, such as Rousseau,[137] viewed parties as an expression of narrow partisan interest which would work against the formation of a democratic general will. It was not until the early twentieth century and a comprehensive extension of the franchise that political parties were afforded a 'positive normative connotation'[138] with regard to democracy.

> "It was the advent of mass democracy which made direct links between the state and the individual increasingly unrealistic and which thus served to legitimize the existence of parties as intermediary institutions between individual citizens and the state."[139]

This aura of legitimacy increased throughout the twentieth century. Ingrid Van Beizen has noted an increasing trend for previously totalitarian societies such as Germany and Italy (in the immediate post war period) and the post Communist polities of late 20th century Eastern Europe to define modern democratic politics in terms of the ascendancy of parties.

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[134] Cram, Op cit, 71
[135] Ibid
[136] J Madison, A Hamilton and J Jay [I Kramnick (ed)] *The Federalist Papers* No. X(Harmondsworth: Penguin, 1987).
[137] Rousseau, Op cit
[138] Van Biezen, Op cit
[139] Ibid, 3

> "While parties were not necessarily seen as inevitable, let alone desirable, political institutions when they first emerged, they have now become firmly rooted in the established democracies and have rapidly acquired relevance in more recently established democracies in Eastern Europe and elsewhere in the world, to the point that they are widely seen as a *sine qua non* for the organization of the modern democratic polity and for the expression of political pluralism."[140]

The contention that political parties are a central mechanism intrinsic to a healthy democracy is not only reflected within national polities but is also recognised within international human rights law. A clear example of this can be found in the jurisprudence of the European Court of Human Rights. Firstly, the Court has explicitly stated that the scope of protection afforded by the Convention right to Freedom of Association[141]extends to political parties.

> "…political parties are a form of association, and that in view of the importance of democracy in the Convention system, there can be no doubt that political parties come within the scope of Article 11."[142]

With respect to the 'importance of democracy', the Strasbourg Court has stated that democracy represents 'the only political model contemplated by the Convention and, accordingly, the only one compatible with it.'[143] Political parties are considered not only worthy of protection but are perceived to play 'a primordial role'[144] within a democratic regime. The following section will provide substance to the contentions of both Van Beizen and the Strasbourg Court by detailing the different ways in which political parties give weight to and help provide balance between the four principles previously identified.

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[140] Ibid 1
[141] Convention for the Protection of Human Rights and Fundamental Freedoms in Europe (ECHR) (1950) Art 11 (1)
[142] *Socialist Party v Turkey* (1999) 27 E.H.R.R. 121 at paragraph 28
[143] *United Communist Party v Turkey* (1998) 26 E.H.R.R. 121, Article 45
[144] *Refah Partisi v Turkey*, Grand Chamber (2003) 37 E.H.R.R 1, Article 87

Intro:4:2 Political Parties and the Four Principles

Four principles vital to substantive disagreement and thus the epistemic virtues of democratic government have been identified as *representation, popular sovereignty, equality and changeability.* The argument advanced earlier has been that while these principles are crucial to any understanding of the operation of modern democracies, an unrestrained commitment to any can potentially pose threats and challenges to the others. Therefore, the health of modern democracies depends to a large extent on a proper balance being struck amongst and between these principles. It is contended that as political parties are essential mechanisms of modern democracy, they consequently play a crucial role in striking that balance. The roles and functions they perform are both numerous and complementary.

Firstly, with regard to *representation,* political parties play an indispensable role in the original and continuing articulation of diverse interests and preferences that exist within the complex polities of the contemporary world. They act as a mechanism by which individuals are able to unite and collectively give expression to shared interests and ideas. As early as the final years of the 18th Century, James Madison argued that uneven levels of property ownership would lead to an inevitable difference of economic interest which would then be reflected in the formation of competing political factions.[145] From a British perspective, the emergence in the 19th century of a two party system which reflected the interests of both the aristocracy and the bourgeoisie and the subsequent challenge to it in the early years of the twentieth century by a party representing the interests of the industrial working class[146]offers convincing subsequent evidence for Madison's claim. The existence of political parties cannot, however, be attributed simply to the existence of economic inequality. The 20th and early years of the 21st Century have also seen the emergence of political parties throughout the democratic world whose ideologies and philosophies constitute an articulation of social and political values which are primarily non-economic. Examples include parties whose main focus is the protection of the environment such as the *Greens,* those who wish greater self government for their nation or region such

[145] Federalist Paper no X (1787) discussed in Graeme Duncan (ed), *Democratic Theory and Practice,* Cambridge University Press,(1983) 62-67
[146] Conservative, Liberal and Labour Parties respectively

as the *Scottish National Party* and *Bloc Quebecois* in Canada, and those of a religious nature which include the *Christian Democrats* in Germany and *AKP* in Turkey. The existence of such parties as well as those whose origins are economically based are an institutional outcome of economic and social diversity and the inevitable disagreement that proceeds from it. The function of parties in this regard is not only to reflect the existence of disagreement but to mobilize the passions and beliefs that underlie such disagreement towards democratic participation.

In respect of *popular sovereignty,* parties play a central role in facilitating the election of governments who represent (however imprecisely)[147] a temporary expression of the people's will. One specific function is the aggregation of interests and preferences. Aggregation 'refers to a…process by which parties bundle together the diverse demands of a variety of social groups.'[148] Such a process is potentially troublesome as it may require a 'prioritization of demands'[149] alongside attempts to maintain a unified coalition amongst different groups whose own priorities 'may be in tension with each other.'[150] Despite the potential problems inherent in the aggregative process, it is vital if a specific party aspires to another role that parties play within democracies, that of being a conduit through which governments accede to power.

With regard to the formation of governments, political parties offer the individual voter both a selection of candidates and a set of policy proposals which he or she can contrast with other parties. In doing so, parties help to 'structure the voting choice'[151] and help convert the aggregated preferences of voters into the election of a government. Once a government has been formed, a continuing task of political parties is to ensure that the government remains accountable to the public. This can be achieved in a couple of ways.[152] Firstly, the governing party's actions can be evaluated against the promises it made at election time. Secondly, a failure to match

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[147] See Section on Popular Sovereignty in previous section
[148] Paul Webb 'Political Parties' in Paul Webb, David Farrell and Ian Holliday (eds), *Political Parties in Advanced Industrial Democracies,*(Oxford University Press), 2002,12
[149] Ibid
[150] Ibid
[151] Leon D. Epstein, *Political Parties in Western Democracies,* Pall Mall Press, (1967) 14
[152] For a detailed exposition of the centrality of parties to government formation and accountability see- Richard Katz, 'Party Government: a rationalistic conception', in Francis G. Castles and Rudolph Wildemann (eds), *The Future of Party Government: Visions and realities of Party Government,* Volume 1 (Walter de Gruyter) 1986, 31-71

promises with action may result in a transformation of electoral preferences facilitated by the existence of competing parties with alternative proposals.

> "…the government carries out the kind of policy programme with which the governing parties identified themselves at the previous election; their incentive for doing so lies in the need to face re-election and the prospect of having to retain the support of their electorates."[153]

With regard to the maintenance of democratic *equality* and *changeability*, the existence of political parties is again a necessary ingredient. As was conceded earlier, the system of majority rule inherent in popular sovereignty potentially threatens the rights of those who may find themselves in a temporal minority. In order to protect continuing access to and participation within the political system, limitations in the form of legal rights can be placed on the enforcement of collective preferences. The right of freedom of association as given institutional expression in the form of political parties fulfils at least two further functions. Firstly, it contributes to the protection of *equality* by allowing for the continuing articulation and expression of preference by those who are unfortunate enough to reside in a temporal minority. Secondly, political parties constitute 'a necessary condition'[154]of *changeability.* By providing the electorate with an alternative set of candidates for legislative and executive office as well as acting as a mechanism for the articulation and aggregation of complex interests and preferences, political parties offer individual citizens within a polity both the prospect of a change in government as well as a change in legislative outcomes.

For these numerous reasons, political parties are essential to both the effective functioning and long term sustainability of democratic governance. Consequently, it is contended that attempts to enforce either a legal prohibition on the formation of a new party or a legal dissolution should only be made under exceptional circumstances. As the next section illustrates, however, there is no consensus on what constitutes an exceptional set of circumstances.

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[153] Alan Ware, *Political Parties and Party Systems* ,(Oxford University Press) 1996, 318
[154] Epstein, op cit 12

Intro:5 The question of Party Prohibition

With respect to the question of when parties can be either legally prohibited or dissolved, the Council of Europe (the parent body of the European Court of Human Rights) has set guidelines that err unmistakably on the side of caution

> "The prohibition or dissolution of political parties as a particularly far reaching measure should be used with utmost restraint. Before asking the competent judicial body to prohibit or dissolve a party, governments or other state organs should assess, having regard to the situation of the country concerned, whether the party really represents a danger to the free and democratic political order or to the rights of individuals and whether other less radical measures could prevent the said danger."[155]

Such caution arguably constitutes a reflection of the recognition of the central role that political parties play within modern polities. This centrality, however, is potentially a double edged sword. As Eva Brems has acknowledged[156], there is an argument that because popular political parties often have the ability to realize their aims in government, more convincing arguments may exist to prohibit them than other organizations, especially if their aforementioned aims are deemed to be illegitimate. Interestingly, a similar argument has been utilized by the Strasbourg Court to uphold a specific dissolution.

> "It is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries By the proposals for an overall societal model which they put before the electorate and by their capacity to implement these proposals once they come to

[155] The Venice Commission- *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures* ,CDL-INF(2000)001 at www.venice.coe.int/docs/1999/CDL-INF(1999)015-e.asp Guideline 5

[156] Eva Brems 'Freedom of Political Association and the Question of Party Closures' in Sadurski (ed) 2006, 149

> power, political parties differ from other organizations which intervene in the political arena."[157]

This penultimate section of this chapter will illustrate the lack of consensus surrounding these questions by contrasting and evaluating the two main relevant schools of thought relating to party prohibition. It will be evident that the relevant debate mirrors that which was concerned with a moral justification of democracy. Firstly, the debate is between adherents of either a procedural or substantive approach. Next, it will become apparent that both approaches betray similar weaknesses as were prevalent within their justifications of democracy. The procedural approach seems recklessly unconcerned with outcomes while the substantive view is too ready to dilute procedural equality on the premise of protecting an artificial consensus.

Intro:5:1 Procedural Approach

As indicated previously, the procedural approach to democracy is dismissive of the notion that the interests and preferences of an entire citizenry can be equally satisfied on the grounds that there exists a lack of the necessary knowledge, resources or consensus to achieve such a goal. Therefore, the most that can be achieved is an equal consideration of individual and collective interests and preferences. Consequently, democratic procedures must allow for the expression and possible implementation of ideas and preferences that challenge and even threaten orthodoxies such as the existence of democratic governance itself.

> "I reject the notion that one should build into democracy any constraints on the content of the outcomes produced, such as substantive equality, respect for human rights, concern for general welfare, personal liberty or the rule of law. The only exceptions (and these are significant) are those required by democracy itself as a procedure."[158]

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[157] *Refah Partisi v Turkey*, Grand Chamber, (2003) 37 E.H.R.R. 1,87- This is a highly controversial case which will be analysed in detail in next chapter

[158] Brian Barry *Democracy and Power – Essays in Political Theory I* (Oxford: Clarendon Press, 1991) 25 quoted in Cram Op Cit,74

Ian Cram argues that the modern democracy that 'comes closest to manifesting the attributes of a procedural view of democracy' is the United States of America.[159] As will discussed in the final substantive chapter, First Amendment Jurisprudence emanating from the Supreme Court has tended to focus primarily on the right to freedom of expression. With regard to political expression, it has long been established that restrictions are only justified if the expression in question is deemed to represent a *clear and present danger* to the United States.[160]The leading modern authority on what constitutes a *clear and present danger* is the *Brandenburg* case.[161]It interpreted *clear and present danger* in such a way as to suggest that political advocacy must be afforded the protection of the First Amendment of the United States Constitution unless it can be proved to be 'directed to inciting or producing imminent lawless action and is likely to produce such action.'[162] With respect to the right of freedom of association which is not explicitly guaranteed within the First Amendment, the Supreme Court established in a subsequent case[163] that the principles propounded in *Brandenburg* applied not only to individuals but to 'state regulation burdening access to the ballot' and to 'rights of association in the political party of one's choice.'[164] Applying the *Brandenburg* template, it is evident that both individuals and political parties are conferred a wide degree of latitude in respect of their rights of political advocacy. The idea that political parties could or should be dissolved on the basis of ideology is constitutionally unthinkable. As Dan Gordon has pointed out, American Courts have

> '…uniformly denied the constitutionality of restrictions on political expression merely on the basis of a party's platform, no matter how undemocratic.'[165]

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[159] Cram Op cit, 75
[160] *Schenck v United States* 249 U.S. 47 (1919)
[161] *Brandenburg v Ohio,*395 U.S. 444 (1969)- It is important to note that pre-Brandenburg, the United States Supreme Court regularly interfered with rights of political expression and association. This disconnect between modern perception and historical reality will be further acknowledged in the next chapter
[162] Ibid at 447
[163] *Communist Party of Indiana v Whitcomb,* 414 U.S. 441 (1974)
[164] Ibid at 449
[165] Dan Gordon 'Limits on Extremist Political Parties: A comparison of Israeli Jurisprudence with that of the United States and West Germany in *Hastings International and Comparative Law Review,* Volume 10, (1986-87), 377

The relatively wide toleration of subversive advocacy afforded in the United States is (it shall be argued later) partially attributable to the relative stability of American democracy and its two party system. Consequently, such an approach might not be appropriate to countries or jurisdictions whose history bequeaths a dissimilar, more fragile political context.[166] Given the fragile commitment to democracy evidenced in the modern history of many countries, critics of a procedural approach contend that such a method is recklessly protective of rights of expression and association in that it

> "...opens up the possibility that a democratic system of government might be overthrown under the established democratic route of success at the ballot box. It is important to recognise that capture by non-democratic groupings might occur even where the non-democratic party fails to secure a majority of seats in the legislature. The classic example of such an undermining from within is provided by the rise of the National Socialist Party in Germany…"[167]

The coming to power of the Nazis in Germany by democratic means despite advocating an explicitly anti-democratic ideology and acquiring just over a third of the votes at the previous election illustrated the dangers of affording equal procedural rights to those who would use them in order to gain the authority to then deny them to others. It was in response to this catastrophe that a theory emerged from within a substantive paradigm which whilst acknowledging the role of parties within the democratic process allows for prohibitions on specific manifestations of these institutions in the name of upholding democracy.

Intro:5:2 Militant Democracy

Militant Democracy is a theory which was originally articulated by Karl Loewenstein in the late 1930s as a response to the seeming inability of western democracies to protect themselves from the onward march of the totalitarian ideologies of both

[166] Samuel Issacharoff, 'Fragile Democracies' in *Harvard Law Review*,Volume 120 (6), 2007, 1421
[167]Ian Cram, 'Constitutional responses to extremist political associations –*ETA*, Batasuna and democratic norms' in *Legal Studies*, Volume 28(1), 2008,74- 75

Communism and Fascism.[168] Loewenstein argued with specific reference to Weimar Germany that a traditionally procedural approach to democracy had irresponsibly afforded toleration of extremist parties who had subsequently used the freedoms inherent within democracy to destroy it from within.

> "Democracy was unable to forbid the enemies of its very existence the use of democratic instrumentalities…democratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city. To Fascism in the guise of a legally recognized political party were accorded all the opportunities of democratic institutions."[169]

Loewenstein's solution to such potential weakness was to propose that democracies arm themselves with constitutional and legislative protections that allow for restrictions on the political rights of those opposed to his own substantive conception of democracy.

> "In this sense, democracy should be redefined. It should be…the application of disciplined authority, by liberal minded men, for the ultimate ends of liberal government: human dignity and freedom."[170]

While Loewenstein's critique concerning the weakness of Weimar Germany and his desire to protecting democratic systems of governance from those who wish to destroy them from within both have historical validity, his chosen method of the widespread adoption of constitutional and legal restrictions on political parties in pursuit of this goal raises legitimate concerns. Firstly, the existence of legal restrictions on political parties suggests an acceptance of the idea that the State may legitimately construct 'a boundary' around the notion of political participation and

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[168] Karl Loewenstein 'Militant Democracy and Fundamental Rights' in *American Political Science Review*, Volume 37 (3 and 4) reproduced in Andres Sajo (ed) *Militant Democracy*, Eleven International, 2004, 231-262
[169] Ibid, 237
[170] Ibid 262

subsequently exclude those who are judged to be on 'the wrong side' of it.[171] Such an acceptance helps illuminate an essential contradiction at the heart of militant democracy. It is prepared to sacrifice specific democratic values for the purpose of upholding others.

> "Paradoxically, for a system that is committed to the value of tolerance, the state needs to act intolerantly towards those who do not subscribe to this value and other core precepts such as the equal worth and dignity of each individual, the rights of minorities, the rule of law and freedom of expression."[172]

Next, just as adherence to a substantive justification of democracy 'raises the problem of disagreement on the objectives and ideals the legal and political system should [pursue] and observe',[173] there is a possibility that legal restrictions up to and including dissolution may be visited upon political parties on the basis of values that have not acquired universal acceptance and are subject to legitimate contestation and dissent. For example, Loewenstein's redefinition of democracy as a means to the 'ends of a liberal government'[174] presupposes a consensus within a democratic polity that characterizes liberal aims as unquestionably reasonable and conversely, goals or policies which contradict these aims as illegitimate. A concern here is that parties would potentially be vulnerable to prohibition not because they constitute a tangible threat to the continuing existence of democratic governance but that they simply represent a challenge to what Paul Harvey has called 'the dominant national ideology.'[175] The utilisation of prohibitive measures in such circumstances, it is contended constitutes not an upholding of democracy but a substantive limitation of the fundamental disagreement that provides the epistemic virtues inherent in democratic decision making.

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[171] Issacharoff, Ibid, 1414
[172] Cram, Op cit, 77
[173] Markus Thiel 'Comparative Aspects' in Thiel (ed) *The 'Militant Democracy' Principle in Modern Democracies,* Ashgate, 2009, 386
[174] Ibid
[175] Paul Harvey, 'Militant Democracy and the European Convention on Human Rights' in *European Law Review,* Vol 29(3), 2004, 409

From a more 'militant' perspective, while it is acknowledged that legal measures of prohibition and dissolution do represent a temporary deviation of democratic principle, this acknowledgement is outweighed by the proposition that a temporary deviation may be necessary to protect those very same principles in the long term.

> "A constitution is not a prescription for suicide, and civil rights are not an altar for national destruction…."[176]

This thesis will argue that in order for a party prohibition to be morally and legally justified, the prospect of constitutional suicide must be both theoretical and practically plausible. Not only must the specific party in question be ideologically indisposed to the principles of democratic governance but it must also pose a realistic threat to the continuation of democratic governance and fundamental disagreement with reference to the likelihood of it acquiring power and then implementing an anti-democratic agenda. As John Rawls has argued

> "The conclusion, then, is that while an intolerant sect does not itself have title to complain of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger."[177]

If the continuation of a democratic system of governance is seriously jeopardized by the continued operation of a political party, then restrictions up to and including prohibition must be considered and may be necessary. The problem with a generally 'militant' approach is that it can present and has (as will be evidenced later) presented the prospect of a 'constitutional suicide pact' as justification for the suppression of parties which do not pose a direct and quantifiable threat to democracy but merely possess an ideological antipathy towards values which are not fundamental to democracy but which may be associated with it within specific contexts. Legal prohibitions of specific political parties represent a substantial limitation of the scope

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[176] Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' in *Harvard Law Review*, Volume 116 (16), 2002, at 44

[177] John Rawls, *A Theory of Justice*, Revised Edition, (Oxford University Press), 1999, 193

of fundamental disagreement within a democratic society. It is the contention of this chapter that such a limitation should only ever be applied to protect the long term availability of similar disagreement. Limitation of disagreement in pursuit of a consensual acceptance of a specific conception of democracy represents a dilution of the very aspect of democracy that provides its epistemic virtue and thus its moral basis. A failure to acknowledge the extent of legitimate disagreement within a polity may consequently lead to a general disaffection with and retreat from the political process which may endanger its very fabric.

> "A well functioning democracy calls for a vibrant clash of democratic political positions. If this is missing there is the danger that this democratic confrontation will be replaced by a confrontation among other forms of collective identification, as it is the case with identity politics. Too much emphasis on consensus and the refusal of confrontation lead to apathy and disaffection with political participation. Worse still, the result can be the crystallization of collective passions around issues, which cannot be managed by the democratic process and an explosion of antagonisms that can tear up the very basis of civility."[178]

Intro:6;Conclusion: Prohibition and the Four Principles

This introductory chapter opened with the contention that neither a purely procedural nor entirely substantive approach is sufficient to furnish democracy with an adequate moral justification. Referencing David Estlund's theory of democratic authority, it argues that a convincing justification requires a balance to be struck between procedural and substantive arguments; in this case a recognition that the procedural equality inherent within democratic decision making facilitates the existence of substantive disagreement central to a collective deliberation epistemically superior to simply 'fair' or random procedures. It then proceeded to identify four principles crucial to an understanding of the operation of modern democracy; representation,

[178] Chantal Mouffe , (2000), Op cit, 16

popular sovereignty, equal respect and changeability. These four principles all contain procedural and substantive elements and when aligned in a proper balance, they both reflect the existence and facilitate the continuing existence of disagreement necessary to democracy's epistemic virtues. Conversely, if out of balance, it is conceded they pose a potential threat to each other specifically and to democracy in general.

With regard to the specific issue of party prohibition, it is evident that the adoption purely of procedural or substantive criteria towards the permissibility of prohibitions on political parties suffers from similar weaknesses as are exhibited by the two contrasting approaches when applied towards constructing a moral basis for democracy. A purely procedural approach seems blind to the possibility that unrestricted equality of procedure has been and may in future be utilized to give effect to undesirable outcomes such as the abolition of an entire system of democratic government. Conversely, an insistence that democracy is merely a means towards particular substantive ends potentially allows for the suppression of parties that do not share those substantive goals. Consequently, a more nuanced approach is necessary. If, as has been argued, democracy can be at least partially understood with reference to the four principles of *representation, popular sovereignty, equality* and *changeability* then an evaluation of the legitimacy of prohibitions on associations such as political parties (which play an essential role in the attainment of these principles) should include an assessment of the effect that specific measures have on the balance between them. To some extent, it can be argued that any attempt to restrict the operation of specific political parties represent a violation of all four principles in that political parties are crucial to at least their partial attainment. However, it is also true that prohibitions are often undertaken with the purpose of protecting one, some or all of these principles. What must also be taken into account is the fact that although the idea of political rights is universal, the specific factors of time and place imbue specific manifestations of these rights with their own special concerns. This reality alongside the complexity of the relationships between the four principles require, therefore, a case by case evaluation which takes into account not only an assessment of the ideological threat that political parties may present to a satisfactory balance between democratic principles and but also a measure of the actual threat they pose within a specific political context to the continuation of democratic governance and substantive disagreement.

> "Ultimately…the aim of suppressing threats to the existence of embattled democracies must be to secure the prospect of democratic renewal whereby the capacity of citizens to reject their rulers is preserved."[179]

The opening two substantive chapters of the thesis will examine two jurisdictions where the deployment of a militant approach is clearly evident. Firstly, within Turkey (which has a long history of party prohibition), the case of *Refah Partisi* will be considered. The legal banning of *Refah* whatever its merits represented a highly invasive legal intervention within the democratic polity as it removed a party which had recently been the senior partner in a coalition government. Next, the case of a much smaller party, *Batasuna,* in Spain will be analysed. While the influence of each party was a diverging factor, another main point of difference is that *Batasuna* was banned with reference to methods it was alleged to implicitly endorse while *Refah's* dissolution was based mainly around its alleged commitment to what were perceived as illegitimate ideological goals. What unites the two cases is that both prohibitions were later upheld by the European Court of Human Rights. The next two chapters will analyse jurisdictions which have armed themselves with a variety of 'militant' legislative provisions but who for differing reasons have failed to effectively enforce or utilise them. Firstly, those countries such as Germany in the immediate post war period and the new democracies emerging from behind the Berlin Wall after 1989 will be examined. The utilisation or non-utilisation of measures throughout these jurisdictions is it will be argued more explicable in terms of political climate rather than judicial reasoning. This is in contrast to the following jurisdiction of Israel where explicit legislative provisions allowing for the utilisation of militant measures can be contrasted with the manifestly procedural approach taken by its Supreme Court in its interpretation of them. The final two case studies encompass jurisdictions which have primarily followed a procedural approach to the question of curtailing political rights. Firstly, the approach taken by the relevant authorities in the United Kingdom will be discussed and then followed by an examination of relevant jurisprudence emanating from the United States's First Amendment. It will be evident that in terms of

[179] Samuel Issacharoff, 'Fragile Democracies' in *Harvard Law Review*, Volume 120, 2007, 1415

constitutional protection while political rights in the two countries operate within very different contexts; there are similarities in that the focus of relevant restrictions have tended to concentrate on individuals rather than collective groups such as political parties.

Aside from the specific issues that each jurisdictional context presents, the general approach of the thesis to is to argue that an assessment of the legitimacy of specific restrictions must balance the challenge that they present to the existence of substantive disagreement against the intensity of the threat that inaction would leave that epistemic necessity vulnerable to. Using the four guiding principles identified in this chapter, it is contended that a proper balance within any context must both reflect and facilitate the continuing existence of fundamental disagreement necessary to democracy's vitality.

> "…the prime task of democratic politics is not to eliminate passions from the sphere of the public, in order to render a rational consensus possible, but to mobilize those passions towards democratic designs."[180]

[180] Mouffe (2000), Op cit, 16-17

CHAPTER 1

The entrenchment of Secularism: *Refah Partisi v Turkey*

1:1: Introduction

In 2009, the Council of Europe which is the parent body of the European Court of Human Rights published through an advisory body known as the Venice Commission[181] an opinion highly critical of the propensity within the Turkish polity to initiate and execute measures leading to the dissolution of political parties.

> "Because the substantial and procedural threshold for applying the Turkish rules on party prohibition or dissolution is so low, what should be an exceptional measure functions in fact as a regular one…The Venice Commission is of the opinion that within democratic Europe these strict limitations on the legitimate arena for democratic politics are particular to the Turkish constitutional system, and difficult to reconcile with basic European traditions for constitutional democracy."[182]

The Venice Commission was rightly in the view of this thesis expressing concern about the relative regularity of party prohibitions within Turkey in comparison with other European democracies. Its concern was related to both procedural and substantive concerns. While the substantive reasons for prohibitions occupy most of the consideration of this chapter, it is evident that procedurally the historic ability of the Turkish Constitutional Court to ban parties on a barely qualified majority after referral by a public prosecutor leaves parties more vulnerable than is the case in other democracies. The catalyst for the Venice Commission's opinion was an attempt in 2008 by the Turkish authorities to legally dissolve the political party known as the Justice and Development party (AKP) which was and remains the party in sole control of the

[181] The Venice Commission is a body set up by the Council of Europe to examine and set guidelines for the Strasbourg Court with respect to its consideration of cases directly concerned with democracy. It has set specific guidelines with respect to political parties.

[182] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) opinion on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey Strasbourg, 13 March 2009 opinion No. 489/2008 at 108 and 109

Turkish government.[183] In the view of the Venice Commission, a successful prohibition in this case may have been '…seen as a threat to democracy and as an attempt at disenfranchisement of a large part of the electorate.'[184] The main focus of this opening substantive chapter is the case of *Refah Partisi.* This case it is argued is illustrative of two worrying trends. Firstly, the illegitimate scope afforded to Turkish authorities to dissolve political parties. Secondly, in upholding the decision to dissolve, there has been a failure in the immediate post 9/11 era by the Strasbourg Court to engage with political Islam in a way that allowed for continuing fundamental disagreement.

1:2: *Refah Partisi*

In January 1998, the Turkish Constitutional Court formally dissolved the political party known as *Refah* (Welfare).[185] Within a Turkish context; this step was neither radical nor unprecedented. In the time period between the adoption of the Turkish Constitution of 1982 and the dissolution of *Refah,* fourteen other parties had been subject to prohibition.[186] What was unprecedented about the *Refah* decision (at the time) was that it concerned a party that had won a plurality of votes at the previous parliamentary election and had served as senior partner in a coalition government for a year up to almost exactly the time of dissolution.

> "By any standard, the dislodging of a government from office is a radical intervention in democratic political life by a national court. It took the notion of 'militant democracy', the measures permissible to defend democracy from being subverted through electoral politics, to a new level."[187]

[183] On July 30th 2008, the ruling AKP party escaped prohibition despite a 6-5 vote in favour as new rules meant that dissolution required at least 7 votes. The case against the AKP was similar to *Refah* in that the charges against the party were related to its attitude to Secularism. However, a dissolution would have had arguably greater implications as it would have been targeted against a party with sole control of the government and a comfortable majority in Parliament. It seems that Strasbourg has been spared a particularly tricky decision. For a brief overview of the case see Sarah Rainsford ' Narrow Escape leaves Turkey divided' available at http://news.bbc.co.uk/1/hi/world/europe/7534342.stm
[184] Venice Commission (2009) at 98
[185] Turkish Constitutional Court –Decision No 1998/1
[186] Kevin Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' in *Essex Human Rights Review,* Volume 1(1), 2004, 2
[187] Ibid, 2

Another unusual aspect of the *Refah* case (given the later attitude of the Venice Commission) was that the dissolution was upheld by the European Court of Human Rights on two occasions.[188] This was in contrast to the three previous occasions when dissolved Turkish parties had taken their cases to Strasbourg. On all three occasions,[189] the Court had found that there had been a violation of the Article 11 right to freedom of association.[190]

This Chapter will argue that the Strasbourg decisions to uphold the *Refah* dissolution are inherently flawed. Firstly, it will argue that the evidentiary basis for the dissolution was at best incomplete. Secondly and more fundamentally, it will contend that the implications of the decision represent a violation of the previously identified four guiding principles most notably with regard to the principle of *equal respect* in relation to political Islam.

1:2:1 Background

Refah Partisi or Welfare Party was an Islamic Political party founded in 1983. Between its inception and the mid 1990's, it regularly participated in subsequent national and local elections and grew in popularity for a variety of reasons.[191]The zenith of its electoral fortunes was achieved in 1995 when it gained 158 out of 550

[188] *Refah Partisi v Turkey* (Chamber) (2002) 35 E.H.R.R. 3
Refah Partisi v Turkey, Grand Chamber, (2003) 37 E.H.R.R. 1
[189] *United Communist Party v Turkey* (1998) 26. E.H.R.R. 121
Socialist Party v Turkey (1999) 27 E.H.R.R. 121
Ozdep v Turkey (2001) 31 E.H.R.R. 51

[190] Convention for the Protection of Human Rights and Fundamental Freedoms in Europe (ECHR) (1950) Art 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

[191] See David Schilling, 'European Islamophobia and Turkey-*Refah Partisi(The Welfare Party) v Turkey' in Loyola International and Comparative Law Review*, Volume 26, 2003-04, 502-03

seats in the Turkish Grand National Assembly.[192]In 1996, the party became the senior party in a coalition government and its chairman, Necmettin Erkaban, became Prime Minister of Turkey[193]until both were ousted from power in July 1997 in what was effectively a military coup.[194]

The second article of the Turkish Constitution states that Turkey is a 'democratic, secular and social state.'[195] The Constitution later identifies boundaries for the acceptability of statutes and programmes of political parties.

> "…The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime."[196]

If a political party is adjudged to be a 'centre' of activities which transgress these boundaries, it subsequently becomes vulnerable to prohibition.[197] After an application by the Chief Public Prosecutor in May 1997, the Turkish Constitutional Court formally dissolved *Refah* in January of the following year.[198] The decision stated that as 'Secularism was an indispensable condition of democracy in Turkey',[199] *Refah's* actions constituted a threat to Turkish democracy on three grounds. These were the advocacy of legal pluralism, the intention to introduce Islamic or Sharia law into the general law and the advocacy of the use of jihad or holy war to bring about their goals.[200] In response, the Party lodged an appeal to the European Court of Human

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[192] Mustafa Kocak and Esin Orucu in 'Dissolution of Political Parties in the name of Democracy: Cases from Turkey and the European Court of Human Rights' in *European Public Law*, Volume 9(3), 2003,415

[193] Ben Olbourne 'Refah Partisi (The Welfare Party v Turkey)' in *European Human Rights Law Review* volume 4 (2003) 437

[194] Paul Harvey 'Militant Democracy and the European Convention on Human Rights' in *European Law Review* ,Vol 29(3) 2004, 408

[195] Constitution of the Republic of Turkey (1982)

[196] Ibid, Article 68(4)

[197] Ibid, Article 69 (1)

[198] Turkish Constitutional Court –Decision No 1998/1

[199] Olbourne, Op cit, 438

[200] Ibid

Rights on the grounds that the dissolution amounted to a violation of their Article 11 right to freedom of association.

1:3 The Strasbourg Judgements

1:3:1: Overview

As referenced in the introductory chapter, the European Court has consistently claimed that political parties not only come within the protection of Article 11[201] but that their essential role within modern democracies entail that prohibitions should only be made under exceptional circumstances.[202] From this perspective, the critical attitude adopted by the Venice Commission makes perfect sense. It notes *inter alia* that the regular deployment of dissolution procedures within Turkey implies that such actions are 'not in effect regarded as an extraordinary measure, but as a structural and operative part of the constitution.'[203] It then proceeds to contend that the wide use of the instrument can also be partially explained by the fact that a 'striking feature of the Turkish rules on party closure is that they combine a very long list of material criteria for prohibition or dissolution with a very low procedural threshold.'[204] The combined effect of these factors is one that 'reduces the area for democratic politics'[205] in a way that prevents '…the emergence of political programmes that question the principles laid down at the origin of the Turkish republic.'[206] The Venice Commission clearly views the high incidence of dissolutions within the Turkish polity as an affront to the principle of political pluralism. This distaste is reflected in the fact almost all Turkish dissolution cases that have been argued before the ECtHR have been found to constitute a violation of Article 11 rights. The glaring omission to this trend has been *Refah Partisi.* How exactly did the Court square its commitment to political pluralism with an upholding of this specific dissolution?

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[201] *Socialist Party v Turkey* (199) 27 E.H.R.R. 121at paragraph 28
[202] Ibid, footnote 698
[203] Venice Commission(2009)) Op cit at105(3)
[204] Ibid at 30
[205] Ibid, 108
[206] Ibid,

During the *Refah* Case, the Court affirmed that 'drastic measures such as the dissolution of an entire political party '…may only be taken in the most serious cases.'[207] However, it also argued that

> "By the proposals for an overall societal model which they put before the electorate and by their capacity to implement these proposals once they come to power, political parties differ from other organizations which intervene in the political arena."[208]

Such reasoning, as Eva Brems has argued, represents a qualitative shift in emphasis. Political parties as a necessary component of democratic governance deserve a high level of protection but because they have the potential to directly realize their aims in government, there may be more convincing arguments to prohibit them than other types of association.[209] The application of similar logic allowed the Chamber to assert by a narrow 4-3 margin that the dissolution of *Refah* did not constitute a violation of the applicant's Article 11 rights,[210] a judgement that was upheld unanimously by the Grand Chamber in a subsequent ruling.[211]

These decisions were based on a number of factors. One was a proposal by the party to introduce a plurality of legal systems. This was interpreted by the Chamber as an infringement of both the neutral role of the state as a guarantor of rights and freedoms and of the principle of non-discrimination.[212]Another was the refusal by the Party to condemn or discipline individual members who had publicly hinted at the acceptability of violent methods as part of an overall strategy.[213]

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[207] *Refah (GC)* paragraph 100
[208] Ibid, 87
[209] Eva Brems 'Freedom of Political Association and the Question of Party Closures' in Wojech Sadurski (ed) *Political Rights under Stress in 21st Century Europe,* (Oxford University Press) 2006, 148-49
[210] *Refah* (C) Op cit,77
[211] *Refah* (GC)Op cit, 139
[212] Refah (C), Op cit70
[213] Ibid, 74- The question of how vulnerable a party is to prohibition for either advocacy of or refusal to condemn violence was dealt with again by the Strasbourg Court in the case of *Batasuna*, a political party widely acknowledged to be the political wing of the Basque Separatist organization, ETA- The party was dissolved by the Spanish Authorities in 2003, partly in response to the party's failure to condemn a terrorist attack which killed two of innocent civilians- Tribunal Supremo, Sala Especial, 17th March 2003, This case will be discussed in next chapter. quoted from Brems, Op cit, 168, fn 156

> "(…) acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement this policy and keep the system it envisaged in place."[214]

With specific regard to democracy, the Court based its decisions on two distinct but complementary lines of reasoning. In the original decision, the Chamber claimed that as an Islamic Party, *Refah* held an allegiance to Sharia law which was incompatible with respect for the principles that underlay the Convention. Politically, Sharia as a religious 'dogma' was perceived as a threat to the Convention principle of political pluralism. [215] With regard to other potential civil liberty issues, it was the Chamber's contention that Sharia 'clearly diverges'[216] from the Convention in matters concerning criminal procedure and the role of women and that consequently 'it is difficult to declare one's respect for human rights while…supporting a regime based on Sharia.'[217] This argument was reinforced by the Grand Chamber in its subsequent affirmation of the Chamber's decision.[218]

Having argued that *Refah's* principles were inherently incompatible with the Convention, the Court proceeded to argue that *Refah* constituted a practical as well as an ideological threat to democracy. In a combination of history and demography, the Chamber contended that the previous existence of a theocratic regime,[219] the preponderance of Muslims[220] within the country and the popularity of *Refah* at the time of dissolution[221] made the establishment of a regime based on Sharia '…neither theoretical nor illusory but achievable."[222]

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[214] *Refah*, GC, para 132
[215] *Refah* (C), Op cit 72
[216] ibid
[217] ibid
[218] *Refah* (GC),Op cit 123
[219] Ibid, 65
[220] Ibid
[221] Ibid, 77
[222] Ibid

The Grand Chamber then went on to develop an argument heavily influenced by a the theory known as Militant Democracy.[223] As previously discussed,this theory emerged during the inter-war years as a response to the rise of Fascism and Communism and argues that in order to protect a system of democratic governance; States should take steps to restrict the political rights of anti-democratic forces. The influence of this theory with regard to the decision to uphold evidenced by the Courts assertion that democracy has been historically vulnerable to 'totalitarian movements organised in the form of political parties'.[224] It then proceeded to argue that States should have the right to launch a pre-emptive strike against those it deems to pose a threat to democratic government.[225]With specific reference to *Refah,* it asserted (with the use of election results and opinion polls) [226]that the party posed a real and identifiable threat to democracy and consequently, its dissolution was within Turkey's margin of appreciation.[227]

The remainder of this chapter will subject the Court's reasoning to detailed and critical scrutiny. It will assert that not only does the Court fail to identify a sufficient evidentiary basis for upholding the dissolution but that the implications of its reasoning have profound repercussions for fundamental tenets of democracy.

1:3:2: Insufficient Evidence

1:3:2:1: Advocacy of Violence

Firstly, with respect to the advocacy of violence, the Chamber examined a number of references by prominent members of *Refah* (including Mr Erkaban) to a strategy of jihad or holy war as a means of achieving its societal goals.[228] While the Court accepted the dual argument that *Refah* as a party had pursued its aims through

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[223] The term Militant Democracy was first coined in 1937. See Karl Lowenstein, 'Militant Democracy and Fundamental Rights' in American. *Political Science Review Volume 31* (1937)
[224] *Refah* (*GC),*99
[225] Ibid, 102
[226]Ibid, 107- Figures quoted include popularity level of 38% at time of dissolution with a potential to grow to over 60%
[227] Ibid, 110- The margin of appreciation is a judicially developed doctrine that allows individual states a degree of latitude in their interpretation of Convention rights-see Rhona K.Smith, *Textbook on International Human Rights,* 3rd Edition, (Oxford University Press) 2007, 165
[228] *Refah* (Ch) 74

legitimate means and had never officially endorsed jihad or violence[229] as a political weapon, its failure to publicly distance itself from individuals who had made such statements were potentially indicative of a form of tacit approval.

> "Consequently, *Refah's* leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it."[230]

While it is true that the Venice Commission clearly states that advocacy of or the actual use of violence as a means of overthrowing democracy is a legitimate ground for dissolution,[231] the Court in *Refah* clearly stretches this framework to breaking point by including within it a failure to publicly condemn or discipline individual members who allude to such tactics.[232]

> "Hence the Court takes a broad approach in its appreciation whether or not a party promotes violence: explicit calls for violence are not required, ambiguity may suffice. Such ambiguity exists in a strong form when members advocate violence and the party does not promptly react against this."[233]

By taking such a broad approach, the Court gives greater weight to the fact that the party did not immediately discipline the relevant party members than the fact the *Refah* as a party had never officially used or advocated violent tactics. Such an approach suggests that not only is a party's right to freedom of expression subject to limitation but so is the right to say nothing at all.

With regard to how far an individual's comments can be imputed to a party, the attitude of the Venice Commission is again clear

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[229] See Dissenting Opinion of Judges Fuhrmann, Loucaides and Sir Nicolas Bratza in Ibid, OI 34
[230] Ibid
[231] *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures,*CDL-INF(2000)001 at www.venice.coe.int/docs/CDL-INF(2000)001-e.html , Guideline 3
[232] *Refah (Chamber)* Op cit, 72
[233] Brems, Op cit, 166

> "Any restrictive measure taken against a political party on the basis of the behaviour of its members should be supported by evidence that he or she acted with the support of the party in question or that such behaviour was the result of the party's programmes or political aims. In the case that these links are missing or cannot be established, the responsibility shall fall on the party member."[234]

Again, it is highly questionable how strictly the Court in *Refah* adheres to these principles. Firstly, the Grand Chamber argues that the remarks of Nemcettin Erbakan 'could incontestably be attributed to *Refah'* due to his 'emblematic' role as party chairman.[235] Next, it reaffirms that 'such acts and speeches are imputable to a party unless it distances itself from them.'[236] Finally, it dismisses the expulsion by the party of three such individuals on the grounds that they occurred only after the beginning of dissolution procedures.[237] It is evident that while the Venice Commission places the burden of proof on the prosecutor with regard to the imputability of individual views, the Court in *Refah* places the burden on the party.[238] It can be argued that with respect to whether a political party can be blamed for the views of its members, the Court has abandoned two widely held conceptions of justice: these being the right to silence and the assumption of innocence before guilt.

1:3:2:2: Threat to Secularism

With respect to whether *Refah* posed a real threat to the principle of Secularism, the Court, it is contended, again assumed too much on the basis of too little. First of all, the Chamber broke with previous precedent and failed to take into account the lack of a stated challenge to Secularism either within *Refah's* Constitution or stated policy programmes.

> "No reliance was placed either by the Principal State Counsel in bringing the proceedings or by the Constitutional Court in

[234] *Venice Commission Guidelines* (2000) ,Op cit, Explanatory Report, Para 13
[235] *Refah*,(Grand Chamber) 113
[236] Ibid, 115
[237] Ibid
[238] Brems, Op cit, 185

> dissolving the party on the statute or programme of the party itself or on any election manifesto or other public statement issued by the party. In particular neither the State Counsel nor the Court was able to point to any provision of the statute or detailed programme of the party which advocated the creation of a theocratic State or which served to undermine the secular character of the State as embodied in the Constitution: on the contrary, the programme of the party expressly recognised the fundamental nature of the principle of secularism."[239]

Next, and in a similar vein, '… it was decisive that no evidence had been evinced that the Party had, in its year of government, done anything to challenge secularism.'[240] The Court argued that policy pronouncements in favour of allowing the public wearing of Islamic headscarves and the reorganization of working hours in the public sector to accommodate fasting and prayers were "… consistent with *Refah's* unavowed aim of setting up a political regime based on Sharia."[241] To partially base the dissolution of an entire political party on such statements is in the opinion of Kevin Boyle 'extraordinary.'[242] The reasoning adopted by the Strasbourg Courts seems impervious to the possibility that such measures may enhance rather than restrict rights.

> "There is certainly no wording in the judgments of either the Chamber or the Grand Chamber that acknowledges that either issue might raise questions of respect for religious conviction or its manifestation."[243]

While it seems, therefore, that the evidentiary basis on which the decisions of the Strasbourg Court were based is contentious; it is the implications of the Court's reasoning as applied to democracy which are most troublesome. The final section of

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[239] *Refah*,(Ch), Dissenting Opinion, Op cit, OI 6
[240] Boyle, Op cit, 6
[241] *Refah*,(Ch), Op cit, 73
[242] Boyle, Op cit, 7
[243] Ibid

this chapter will examine the relevant reasoning in detail and contend that it adheres to a specific conception of rights at the expense of the protection of those principles identified as crucial to the maintenance of substantive disagreement.

1:3:2:3 A Threat to Democracy?

As previously alluded to, Strasbourg based its decisions to uphold on the view that *Refah* posed a twin threat to democracy based on both its ideology and growing influence.

1:3:2:3:1: Ideology

Firstly, as has been previously alluded to, the Court ignored the party's Constitution and policy programmes and used 'scattered statements and symbolic public acts by party members of various standing'[244] to conclude that *Refah* intended to impose a general system of Sharia Law. Defining Sharia as a monolithic religious dogma, they declared that 'principles of political pluralism in the political sphere or the constant evolution of public freedoms have no place in it.'[245] The Chamber went on to assert that

> "It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values."[246]

As Christian Moe has eloquently pointed out, there are a number of flaws inherent to such reasoning. Firstly, the contention that Sharia is 'stable and invariable'[247] is highly contentious. Interpreting Sharia as a 'fixed and homogenous concept'[248] ignores interpretations of Sharia that are 'plural and diverse, allowing for a considerable legitimate divergence of opinion (ikhtilhaf) at any point in time'.[249] Such

[244] Christian Moe 'Refah Revisited: Strasbourg's Construction of Islam' 2005 available at www.strasbourgconference.org/papers/RefahRevisited/Strasbourg's Construction of Islam/pdf , 1 and 2
[245] *Refah*, (Ch), Op cit, 72
[246] Ibid
[247] Ibid
[248] Brems, Op cit, 157
[249] Moe, Op cit, 16

reasoning indicates a view of political Islam which is woefully ignorant of 'diverse interpretations' of Sharia which are increasingly being applied 'by Muslims.'[250] From a historical perspective, Islamic Scholars such as Abu Zayd have argued that the history of the Caliphate betrays a struggle for political power predicated on the control of religious authority rather than an unquestioning allegiance to it.[251] Therefore, democracy and pluralism are potentially compatible with the internal workings of the *umma* or community of muslims.

> It is necessary to break the monopoly of power, and the monopoly of the production of the conscience and the memory on the level of peoples from Arab nations and on the level of all the *Umma*, and there is no way to this end unless there is struggle for the recognition of pluralism on the level of thought and the level of society and on the level of politics. This is a total democracy, democracy of reason, democracy of the living represented in the equal rights of human beings, in the participation of the fruits of the national production, and the political democracy in the right of alternance of the authority and the right of participation through the social, cultural and political institutions.[252]

Next, the Courts' reasoning failed to take into account interpretations of Sharia which view it as a set of moral principles applicable to the conscience and behaviour of individuals rather than a set of legally directives enforceable on an entire polity. Such interpretations would view a monolithic Islamic State in negative terms.

> "Acts carried out under duress are neither punishable nor meritorious. To many Muslims, a totalitarian ideological state seeking to enforce Islamic virtue would seem likely only to breed

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[250] Ibid, 1

[251] NAStR HAMID ABu ZAYD, AL-NAss, AL-SULTA, **AL-HAQIQA:** A-FIKR AL-DIN BAYNA IRADAT AL-NMRIF.A WA-IRADAT **AL-HAIMANA** (1995) referenced in Moussa Abou Ramadan 'Notes in the Shari'a:Human Rights, Democracy and the European Convention of Human Rights' in *Israeli Law Review,* Volume 40, 2007, 156-197

[252] Ibid at 164

> hypocrisy. This insight suggests that the sharia does not require private morality to be policed the way it is in Saudi Arabia or Iran. This was in fact the position taken by Refah e.g. on headscarves."[253]

Thirdly, the Court also showed itself to be unaware of an increasing trend amongst Islamic Scholars such as Yusuf Al Qaradawi[254]and Abdullahi An-Na'im[255] to endorse democracy as a protective mechanism of and necessary precondition for 'the authentic exercise of one's religion.'[256] Finally, the Court's lack of awareness extended to examples of Islamic political leadership which have either successfully contributed to the ending of dictatorship (as in Indonesia) or publicly challenged non-democratic secular regimes as in the case of Tunisia.[257] While in the Court's defence, it may be unrealistic to expect them to show expertise in the nuances of Islamic political theology, it is that very lack of expertise which should have motivated them to refrain from making sweeping generalisations which were then used as a basis for upholding prohibition.

> "The problem is precisely that the Court nevertheless *does* venture opinions in these fields and bases its judgements upon them."[258]

In attributing a monolithic and invariable character to political Islam, the Court effectively argues that Sharia represents a threat to principles of political pluralism and that restrictive actions may be necessary to protect the pluralism necessary for a continuing commitment to *equal respect.* However, by ignoring alternative interpretations of Sharia, it can alternatively be argued that while inspired by a commitment to the protection of equal rights, the Court undermines the very principle of *equal respect* which is central to that notion. Firstly, from the perspective of political Islam itself, the attribution to Islam of immutability potentially makes them

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[253] Moe, Op cit, 13
[254] Ibid 15
[255] Ibid
[256] Ibid
[257] Grassroots Organization Nahdlatul-ulama led by Abdurrahman Wahid and Philosopher, Rashid al-Ghannushi respectively. Both referenced in Ibid. Also see John L. Esposito and John O. Voll, *Makers of Contemporary Islam* (New York: Oxford University Press, 2001)
[258] Moe Op cit, 1 and 2

unwitting bedfellows with those who adhere to the very fundamentalism they profess to fear.

> the Court took it upon themselves, and only themselves, the right to declare what is and is not Islamic, leaving no room for others who may have a more liberal interpretation of the *Shari'a*[259]

Also, if the Court was as committed to principles of political pluralism as it suggested,[260] then should it not have viewed the right of religious parties to argue in favour of policies reflecting their own world view as worthy of protection? To conflate the promotion of potentially illiberal policies with a desire to destroy democracy as the Court did in *Refah* ignores the fact that such a fusion was not supported by the official policies of the party,[261]by their actions when in power as the senior partner in a coalition government[262] or by the methods and strategies used by the party in the public arena.[263] Upholding the dissolution of *Refah* in the absence of any such evidence represents another unwarranted interference with the principle of *equal respect*.

> "Illiberal Parties need not be anti-democratic. For example, a religious fundamentalist party that has the support of the electorate of a polity can remain essentially democratic both internally and externally, and yet systematically spread illiberalism. Even from the standpoint of militant democracy, however, illiberalism is not synonymous with anti-democratic, and hence prohibition of illiberal parties would not be as justified… as anti-democratic ones would be."[264]

When one contrasts the decisions reached in the previous Turkish dissolution cases where Strasbourg did find a violation of Article 11 rights,[265]one can clearly identify a

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[259] Ramadan, Op cit, 163
[260] *Refah*, Op cit, 72 see fn 57
[261] *Refah* (GC), Applicants argument, 55
[262] ibid
[263] Refah (CH) , Op cit 74
[264] Michel Rosenfeld ' A pluralist theory of political rights in times of stress' in Sadurski, Op cit, 48
[265] *United Communist Party, Socialist Party, Ozdep,* Op cit

further move away from the principle of *equal respect.* The relevant parties all advocated, to some extent, a degree of self determination for the Kurdish people within Turkey. While these advocacies were viewed by the Turkish authorities as constituting 'threats to the indivisibility of the national and territorial integrity of the State',[266] they were not considered by Strasbourg 'to be inconsistent with fundamental principles of democracy.'[267] However, in *Refah,* the advocacy of specific policies which challenged a rigid Secularism was viewed as being representative of such an inconsistency. This suggests that political advocacies of policies in line with Islamic doctrine are afforded less protection than those emanating from other ideologies. Kevin Boyle has argued that such a disparity is explainable in terms of the contemporary international political context rather than a deep philosophical commitment to the protection of democracy. In specifically contrasting *Refah* with *United Communist Party,* he contends that the finding of a violation of Article 11 rights in the latter case can be explained by the fact

> "…that, since the dissolution of the Soviet Union, the European Court is more relaxed about the promotion of the ideology of Communism than the Turkish authorities."[268]

Conversely, since the attack on the twin towers and the Pentagon on September 11, 2001, it is contended that political Islam has become the new bogeyman to the democracies of the West with subsequent implications for the political rights of those who express support for policies or participate within associations which reside within that ideological paradigm.

> " It is difficult to suppress the thought that the endorsement by a European-wide court of such a radical intervention in the democratic process, as a result of which the choice of a significant percentage of

[266] Mustafa Kocak and Esin Orucu in 'Dissolution of Political Parties in the name of Democracy: Cases from Turkey and the European Court of Human Rights' in *European Public Law,* Volume 9(3), 2003,421
[267] Ibid
[268] Boyle, Op cit, 9

> the Turkish electorate was removed from power, was influenced by the events of '9/11' and the world we have lived in since then."[269]

It is submitted, therefore, that when analyzed in its own terms and in contrast with other cases, the assertion that *Refah* posed an ideological threat to democracy and the reasoning thus applied by the Strasbourg Courts signifies an ideological suspicion of Islam which in turn betrays (at least within the Turkish context), an excessively narrow secular and liberal interpretation of the principle of *equal respect.* When the reasoning behind the assertion that *Refah* simultaneously posed a practical, imminent threat to democracy is also examined, not only is the principle of *equal respect* seen to be violated but so also, are the principles of *popular sovereignty, representation* and *changeability.*

1:3:2;3:2An Imminent Threat?

In its original decision, the Chamber argued that as Turkey had previously experienced theocratic rule and had in terms of the religious beliefs of its population, a Muslim majority; it was especially vulnerable to the introduction of a clerical system of government.

> "the establishment of a theocratic regime, with rules valid in the sphere of public law as well as that of private law, is not completely inconceivable in Turkey, account being taken, firstly, of its relatively recent history and, secondly, of the fact that the great majority of its population are Muslims"[270]

The latter part of this statement betrays significant contempt for political Islam. It effectively argues that a country with a majority of Muslims is more likely to be amenable to the establishment of a theocracy than countries who do not. It again raises the question of whether Islamic political doctrine is afforded *equal respect* in relation to other faiths.

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[269] Ibid
[270] *Refah* (Ch), 65

> "One can only wonder whether the Chamber would extend this argument to other religious groups as well, or whether it sees a disposition for such political projects as something inherent to the nature of Muslims and Muslims only"[271]

The Grand Chamber subsequently argues that modern history provides clear examples of political parties using procedures inherent to democracy in order to substantively undermine it. With clear reference to the rise of Nazism and Fascism, it contends

> "…that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history."[272]

While the Court is unquestionably accurate in its assertion that democracy is and has shown itself to be capable of destroying itself from within, it is questionable whether such an argument should be used as a justification for the dissolution of an Islamic party when the historic references used did not emerge from a similar culture.

> "We know, from bitter experience, that democracy is capable of dissolving itself. This experience, however, derives not from any Muslim "theocracy" but from the Weimar Republic in 1933, at the heart of "Christian", West European civilisation."[273]

Given that the Court viewed *Refah* as an ideological threat to democracy, it viewed *Refah's* success at previous elections and growing support in opinion polls[274] as evidence of an imminent threat to Turkish democracy. It therefore argued that the Turkish authorities were entitled under their margin of appreciation to restrict *Refah's* right of association under Article 11 of the Convention.[275]

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[271] Moe, Op cit, 20
[272] *Refah* (GC), 99
[273] Moe, Op cit, 22
[274] *Refah* (GC), 107
[275] Ibid, 110

> "The Court accordingly considers that at the time of its dissolution, Refah had the real potential to seize political power without being restricted by the compromises inherent in a coalition. If Refah had proposed a programme contrary to democratic principles, its monopoly of political power would have enabled it to establish the model of society envisaged in that programme."[276]

This reasoning represents a clear violation of the principle of *popular sovereignty.* Firstly, by referring to *Refah's* growing strength as a basis for prohibition, the Grand Chamber was effectively arguing that political parties should be more vulnerable to prohibition or dissolution as their popularity increases. Secondly, even if one were to accept this militantly democratic contention, the Grand Chamber's own reasoning would negate the prohibition. By using the phrase 'If *Refah* had proposed a programme contrary to democratic principles'[277] it implicitly accepted that *Refah* had *proposed* no such thing.[278] In that respect if one were to extend the logic applied by the Court to uphold the dissolution, there would be major repercussions for the continuing validity of majority rule throughout Europe.

> "An extension of the ECHR's analysis would lead to the inference that any political party, with a monopoly of control, should be dissolved because its monopoly posed a threat to Turkey's democratic principles."[279]

It is also contended that the effects of the *Refah* decision are deleterious in respect of the principle of *representation.* In modern representative democracies, political parties contribute to the effective representation of the citizenry in two main ways. Firstly, by presenting candidates for public office, they facilitate the aggregation of expressed preferences by the voters into the election of a government. By dissolving a party that had attracted a plurality of support amongst the Turkish electorate, the Strasbourg

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[276] Ibid, 108
[277] *Refah*,(GC), Op cit, 108
[278] In the Chamber decision, the Court had already accepted that the party had used acceptable methods and strategies- (Chamber), Op cit, 74
[279] David Schilling, ' Islamophobia and Turkey- *Refah Partisi v* Turkey' in *Loyola L.A. International and Comparative LawReview,* (Volume 26), 2003-04, 514

Court was effectively expressing at best, indifference or at worst outright hostility to their expressed views.

> "…prohibition is a very restrictive measure, because it disregards the political choice of a large number of voters; it infringes not only the rights of party leaders, but of an increasing number of people."[280]

Secondly, the representative role played by political parties is not solely concerned with the aggregation of expressed preferences. Political parties also play an essential role with respect to the original and continuing articulation of those preferences. The removal of a vehicle that facilitated a continuing articulation of preferences consistent with Islamic beliefs must be viewed with regret.

> "…democracy is not essentially concerned with the aggregation of individual preferences through the mechanism of voting. Instead, it is designed to achieve the potential transformation of preferences of an active public realm which enhances opportunities for discussion and deliberation. Democracy is not just the will of a majority, but of a will that has been formed after wide ranging and free discussion."[281]

If any conception of a popular will is dependent upon it being realized at least partially through wide ranging and free discussion then the Court's unquestioning attitude towards the principle of Secularism has major implications for another guiding principle of democratic disagreement; that being the principle of *changeability.*

1:4 The Triumph of Secularism

In a previous dissolution case, *United Communist Party,* the Strasbourg Court argued

[280] Brems, Op cit, 178
[281] Martin Loughlin, 'Rights, Democracy and Law' in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights,*(Oxford University Press) 2001, 44

> "One of the principal characteristics of a democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence even when they are irksome. Democracy thrives on freedom of expression. From that point of view there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to find according to democratic rules solutions capable of satisfying everyone concerned. The fact that a political programme is incompatible with the current principles and structures of a State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even if that calls into question the way the State is currently organised provided that does not harm democracy itself."[282]

In *Refah*, this reasoning is turned on its head. The Grand Chamber argues that (in the Turkish context), democracy requires a limitation of expression '…that calls into question the way the State is currently organised'[283] by asserting that any attitude that 'fails to respect' the principle of Secularism would not necessarily '…enjoy the protection of Article 9 of the Convention.'[284] From the perspective of the principle of democratic changeability, such reasoning is inherently troublesome.

Firstly, the assertion that Secularism and Democracy are inextricably linked and co-dependent is not entirely historically accurate. As Christian Moe has pointed out, the original Secular republic under Attaturk constituted a one party state and the introduction of multi-party electoral contests after 1946 coincided with a relative relaxation of secularism.[285] As a result, it has been contended that rather than pose a threat to democracy, Refah merely questioned a temporally dominant conception of it.

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[282] *United Communist Party*, Op cit, para 7
[283] Ibid
[284] ECHR, Op cit, Article 9- Freedom of Thought, Conscience and religion
[285] Moe, Op cit, 25

> "It is submitted that Refah did not challenge democracy as such, but rather sought to question an ideology imbued in the institutions of the State and enforced by the Turkish military. It was for such questioning that implicitly challenged the undemocratic control of the military over Turkish political development that it was removed."[286]

In *Refah*, the Court effectively 'welded together'[287] the principles of secularism and democracy. A non-secular regime was viewed as being incompatible with democracy. The Court's inaccurate conception of Islam as a monolith allowed it to uphold the assignment by the Turkish authorities of rigorous restrictions on the potential for change in the name of protecting a continued right to change. In endorsing the constitutionally elevated role of secularism, the Courts have acted as an obstacle to the implementation of popular preferences in respect to both the question of who should occupy positions of power but also on the general nature of the policies that those allowed into power will be permitted to follow. Such a situation is a clear violation of democratic *changeability.*

> "If secularism… is an ideology, should it not, under European Court standards, compete within democratic society with other dispositions? Human rights cannot trump what people regard as authentic meaning to such an extent that it imposes an ideology such as secularism. Yet this is precisely the position in Turkey, where secularism has been imposed through the Constitution for generations by a regime that has nevertheless had an unenviable record of gross human rights violations." [288]

[286] Boyle, Op cit, 12
[287] Ibid
[288] Ibid, 15

1:5:Conclusion: *Refah and* the Four guiding Principles

In asserting that the Strasbourg Courts had taken a 'correct and balanced approach'[289] to the *Refah Partisi* case, Gregory Tardi expressed the following opinion.

> "The conclusion that all democratic states must draw from the *Refah* judgement is that it is dangerous and potentially self-defeating to grant democratic rights to political parties that avow that they would take away those very rights if they would come to power and would then refuse to relinquish power, all in the name of knowing best what is right for the entire people."[290]

Samuel Issacharoff has also defended the decisions reached in Strasbourg with respect to their effect rather than their intrinsic reasoning. In referencing the coming to power in 2002 of the AKP (Justice and Development Party) which is viewed as a 'far more moderate Islamic party',[291] the contention is made that the *Refah* decision

> "…appears to have sparked a realignment in which committed democratic voices from the self proclaimed Islamic communities found a means of integration into mainstream Turkish political life."[292]

It is the conclusion of this chapter that both these assertions exhibit flawed reasoning. With respect to the former, these flaws are two-fold. Firstly, it is the opinion of this thesis that the Courts failed to establish a sufficient evidentiary basis for the argument that *Refah* ever posed an ideological threat to democracy. Secondly, in giving disproportionate protection to the Turkish constitutional principle of Secularism at the expense of observance of the Article 11 rights of a party that merely challenged specific manifestations of that principle, it was the Court rather than the party that

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[289] Gregory Tardi 'Political Parties Right to Engage in Politics' in Andres Sajo (ed), *Militant Democracy*, Eleven International, 110
[290] Ibid
[291] Samuel Issacharoff, 'Fragile Democracies' in *Harvard Law Review*,Volume 120 (6), 2007,1446
[292] Ibid

were taking away rights 'in the name of knowing what is best what is right for the entire people.'[293]

With respect to Issacharoff's argument, the subsequent attempt by Turkish authorities to dissolve the AKP[294] (which only narrowly failed) suggests that while there may indeed have been a 'realignment' of Islamic political forces within Turkey, the continued blind protection of Secularism acts as a potential barrier to observation of the four democratic principles identified in the opening chapter. With regard to the 'realignment' of Islamic political forces, Christian Moe has forcefully argued that while this may have indeed happened, it is certainly not attributable to the 'generalisations…hidden biases and double standards'[295] of the Strasbourg Courts.

> "It represents is another missed strategic opportunity for the socialisation of an Islamic political movement into democratic politics, the conversion through the exigencies of political participation of Islamists into "Muslim Democrats." If this transition has in fact nevertheless been completed in Turkey through the establishment and electoral success of the AK party, it is despite rather than thanks to the efforts of the Turkish Government and the Strasbourg Court."[296]

With respect to the four guiding principles, it is the opinion of this thesis that the decisions reached by the Strasbourg Court in *Refah* are both ill considered and arrogant. Firstly, with regard to *popular sovereignty* and *representation,* the decision validates the removal of a vehicle for both the articulation and aggregation of preferences of a substantial minority within the polity. The specific prohibition also does not even have the arguably redeeming feature (as is the case in the next chapter

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[293] See fns 799 and 800 above

[294] Rainsford Op cit
It has also been argued that the decision not to dissolve does not indicate a change in opinion on the importance of Secularism but can be related to AKP's wish to join the EU which it is argued offers a degree of reassurance on AKP's attitude towards both Secularism and Democracy
For a more detailed exposition of this argument-see Cenap Çakmak and Cengiz Dinc 'Constitutional Court: Its Limits to Shape Turkish Politics' in *Insight Turkey*, Volume 12(4), 2010, 69-92

[295] Moe ,Op cit, 29

[296] Ibid

and the dissolution of *Batasuna*) of being supported by the majority of the population. Next, in terms of *changeability*, the Court effectively put limits upon the type of change that could be campaigned for within Turkey. Change is to be limited to advocacies and policies which do not threaten or even challenge a liberal secular view of democracy. Finally, with regard to the principle of *equal respect*, the Court by refusing to consider alternative conceptions of Islam consistent with democracy displays both ignorance and arrogance. Effectively, it is arguing that western liberal democracy has nothing to learn from political Islam; that any educative process should and can only be a one way street. The problem with such an approach is that it encourages polarization rather than democratic contestation and debate. The recent difficulties enveloping Egypt represent an example albeit an extreme one of a polity where citizens treat fellow citizens simply as enemies they can demonise rather than opponents that can or should be listened to.

The following substantive chapter will consider a case from Spain that represents another 'militant' and invasive legal intervention within the democratic arena. Aside from the scale of the intervention, the prohibition of *Batasuna* exhibits similarities to *Refah* in that the relevant dissolutions were both upheld by the Strasbourg Court. However, the two cases differ in two distinct ways. Firstly, while *Refah* was a large popular national party, Batasuna was a small regionally based party with no realistic prospect of attaining legislative or executive power. Also, while Refah was prohibited largely on the basis that its ideological goals were inconsistent with democratic decision making, the dissolution of Batasuna was premised on the assertion that it tacitly endorsed methods deemed contradictory to democratic debate.

CHAPTER 2

Democracy and the advocacy of political violence
Batasuna v Spain

2:1: Introduction

In 2003, the political party known as *Batasuna* was legally dissolved by the Spanish Supreme Court.[297] The party was widely acknowledged to be the political wing of the Basque terrorist group ETA. Its dissolution was subsequently upheld by the European Court of Human Rights in 2009.[298] *Batasuna* posed a perceived threat to the Spanish State in two different ways. Firstly, in ideological terms, it aspired along with other parties to create an independent Basque state free of interference from both Spain and France. Secondly, and in contrast to other nationalist parties, it was adjudged to have both implicitly and explicitly endorsed the use of violence as a strategic means to political ends. As has been argued so far in this thesis, the dissolution of a political party represents a major legal incursion into the arena of democratic contestation. The right of freedom of association is widely acknowledged to be central to the effective functioning of contemporary democracies. Not only do political parties act as a conduit by which governments' can both accede to power and be held accountable, but they also act as a mechanism by which both the composition of and policies followed by elected governments can be transformed. The continuing prospect of change is fundamental to any notion of democracy.

> "…the democratic future of a democracy hinges on the convertibility of majorities into minorities, and conversely, of minorities into majorities."[299]

Given the importance of their role, it is commonly accepted that attempts to enforce legal prohibitions on the existence of specific parties should only be made under

[297] Tribunal Supremo, Sala Especial, March 2003 referenced in Victor Ferreres Comella, 'The New Regulation of Political Parties in Spain, and the decision to Outlaw Batasuna' in Andres Sajo(ed), *Militant Democracy*, Eleventh International, (2004), 133-156
[298] *Batasuna v Spain* , application no 25817/04 –Judgement June 30, 2009-ETA stands for Euskadi Ta Askasuna which translates as Basque Homeland and Freedom
[299] Giovanni Sartori, *The Theory of Democracy revisited,* Chatham House, (1987), 32-33

exceptional circumstances. In 1999, an advisory body to the Council of Europe popularly known as the Venice Commission[300] adopted a set of guidelines intended to influence both member states and the Strasbourg Court with regard to the potential prohibition of political parties.[301] Most of the guidelines echo previous jurisprudence from Strasbourg in that they assert the importance of political parties to the democratic process[302] and consequently impose requirements of both restraint[303] and proportionality.[304]

With regard to which types of political party may be vulnerable to interference, the third guideline states

> "Prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution."[305]

As referenced above, a relatively recent example where a specific party was adjudged to have met the criteria of this guideline occurred in the case of *Batasuna*[306] when the European Court of Human Rights upheld their dissolution by the relevant Spanish authorities. This Chapter will contend that the decision to uphold the prohibition is flawed for a couple of reasons. Firstly, it will argue that the evidence presented against the party is not only insufficient to meet the legal requirements of a strictly procedural approach to the question of party prohibition but that it also fails to establish a level of threat necessary for prohibition under a substantive 'militant' approach to such questions. More fundamentally, it will contend that while the

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[300] Official name is the 'European Commission for Democracy through Law'
[301] *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures,*CDL-INF(2000)001 at www.venice.coe.int/docs/CDL-INF(2000)001-e.html
[302] Ibid , guideline 1
[303] Ibid, 5
[304] Ibid, 6
[305] Ibid,3
[306]

decision to dissolve is arguably consistent with the principle of *popular sovereignty*, it is outweighed by the challenge that it presents both in theoretical and pragmatic terms[307] to the other three principles necessary to the continuation of substantive disagreement

2:2: The dissolution of *Batasuna*

2:2:1: Background

The terrorist organization *ETA* was formed in the early years of the 1960's as a response to the totalitarian and centralizing nature of General Franco's fascist regime.[308] Its commitment to violence survived beyond the demise of Franco's regime and continued into the modern era of Spanish democracy.[309] While its main political goal of achieving independence from Spain is a legitimate aspiration to hold and campaign for in a democratic society, the means it has chosen in pursuit of that goal are a great deal more contentious, with it has been estimated, at least 800 deaths directly attributable to its actions.[310] Eventually, in late 2011, ETA announced a permanent and definitive ceasefire.

The political party, *Batasuna* was formed in 2001[311] from the wreckage of *Euskal Herraritok* which folded earlier that year after disastrous election results.[312] The original incarnation of the party occurred in 1978 under the name *Herri Batasuna*.[313] It is widely accepted that all three organizations have served as the political wing of ETA in much the same way as *Sinn Fein* fulfilled that purpose for the *Irish Republican Army*.[314]

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[307] . With reference to recent scholarship on terrorism, the paper will contend that the prohibition of such parties is likely to be inimical to the aim of protecting the citizenry from political violence
[308] Ian Cram 'Constitutional Responses to extremist political associations- ETA, Batasuna and democratic norms' in *Legal Studies* Vol 28(1) 2008, 80
[309] For a concise summary of the history of ETA- See Leonard Weinberg, Ami Pedazhur and Arlie Perliger, *Political Parties and Terrorist Groups*,2nd Edition, Routledge, (2009), 98-102
[310] Eva Brems 'Freedom of Political Association and the Question of Party Closures' in Wojech Sadurski (ed) *Political Rights under stress in 21st Century Europe*, (Oxford University Press) 2006, 167 fn 152
[311] Brems, Op cit, fn 154
[312] Cram, Op cit, 83-84, the party name translates as 'Basque Citizens'
[313] Brems, Op cit
[314] Cram, Op cit, 82

In 2002, at the behest of the Spanish Parliament, the Spanish public prosecutor began proceedings against *Batasuna*. These proceedings were at least partially motivated by the political pressure that emerged after the party refused to join others in condemning an ETA atrocity which saw a car bomb take the lives of two innocent civilians. On March 27th 2003, the Spanish Supreme Court declared *Batasuna* to be an illegal organization.[315]

2:2:2 Legal Bases for Proscription

Article 22(2) of the Spanish Constitution states that 'that 'Associations which pursue ends or use means legally defined as criminal offences are illegal.' Articles 578 and 579 of the Spanish Criminal Code make it illegal to 'proffer expression in praise or in justification of terrorism…'[316] However as Victor Comella has noted, Courts in Spain have been hesitant to enforce criminal penalties on associations such as political parties which may have thousands of members.[317] The response of the Spanish legislature to this dilemma was to pass a law on political parties in 2002[318] which effectively creates an 'intermediate stage'[319] between criminal illegality and legality that can be described as 'constitutional illegality.'[320]

The new law allows the Spanish judicial authorities to declare a party illegal if it indulges in behaviour which can be construed *inter alia* as 'legitimizing violence as a means of reaching political objectives'[321]and 'supporting the actions of terrorist organizations in order to subvert the existing constitutional order or egregiously affect…public order.'[322] The parameters of these actions are more clearly defined in Article 9 (3) which applies them to those parties which 'give express or tacit political support to terrorism, and thus legitimize terrorist actions…'[323]

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[315] Tribunal Supremo, Sala Especial, March 2003 referenced in Comella, Op cit, 136
[316] Comella, Ibid, 138
[317] Ibid
[318] LO 6/2002, Ley Organica de Partidos Politicos(L.O.P.P.)
[319] Comella, Op cit
[320] Ibid
[321] L.O.P.P Op cit –Article 9(2(b))
[322] Ibid- Article 9(2(c))
[323] Ibid- Article 9(3)

In applying this law to *Batasuna*, the Spanish Supreme Court based its declaration of illegality on two grounds. Firstly, the refusal by *Batasuna* to condemn terrorist actions was equated as illegal action in the form of tacit political support.[324] Secondly, public statements made by prominent members of the party were judged to be providing 'explicit support to ETA and creating an atmosphere of terror and intimidation…'[325] The further question of whether a statute whose passage was clearly motivated by the desire to prohibit a specific political party was constitutional was answered in the positive by the Court.

> "The Constitutional Court…held that the statute is valid as far as this problem is concerned. That the intention to ban Batasuna was the *occasio* to enact the statute does not mean the Statute's *ratio* is only to ban Batasuna…The Statute is applicable in the future to any other party that falls under it definitions and this is sufficient to answer the objection that the statute targets a particular party."[326]

In response, representatives of the party lodged an appeal to the European Court of Human Rights alleging violation of their Article 10 and 11 rights to freedom of expression and association respectively.

2:3: The Strasbourg Judgement

On June 30, 2009, the European Court of Human Rights published its decision.[327] In its general approach to these questions, the Court basically poses three tests for the legitimacy of a restriction.[328] Firstly, is the interference 'prescribed by law'? In the specific case of *Batasuna,* the Court asserted that the prohibition was legally merited on the basis of the Law on Political Parties (2002).[329] It did so by rejecting the applicants' arguments that the law had been applied retro-actively while at the same time stating that the principle of non-retroactivity[330]could not be applied in non-

[324] Brems, Op cit, 168
[325] Ibid, 169
[326] Tribunal Supremo, Sala Especial, March 2003 referenced in Comella, Op cit, 147
[327] *Batasuna v Spain,* Op cit
[328] For a more detailed discussion of these three tests see Brems, Op cit,128-29
[329] L.O.P.P, Op cit
[330] E.C.H.R. (Article 7(1))

criminal cases.[331] The second test is whether the restriction meets a legitimate aim under Article 11 of the Convention.[332] The Court argued that the restriction pursued several legitimate aims including public safety and protection of the rights and freedoms of others.[333] The third and most important test in assessing the proportionality and subsequent legitimacy of a restriction is whether the relevant interference is 'necessary in a democratic society.' The phrase 'necessary in a democratic society' was originally defined by the Court during the Article 10 case, *Handyside.*[334] In this decision the Court argues that the phrase should not be defined as merely 'useful' or at the other extreme 'indispensable'. Instead it should be taken as to imply 'a pressing social need.'

2:3:1 Pressing Social Need?

As already discussed,[335] with regard to whether an interference with Article11 rights meet a pressing social need, the guidelines of the Venice Commission permit prohibition with respect to the advocacy of violence. Relevant jurisprudence from the previous case study also states

> "…the Court considers that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: first, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the

[331] *Batasuna,* Op cit at 59

[332] Article 11(2) of the Convention allows States "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or the protection of the rights or freedoms of others…"

[333] *Batasuna* Op cit, ,64

[334] *Handyside v United Kingdom,* (1979-80) 1.E.H.R.R. 737,48

[335] See fn 304 above

> Convention's protection against penalties imposed on those grounds."[336]

In this specific case, the Court found that while the change proposed by *Batasuna* was compatible with the guiding principles of democracy, actions and speech imputable to *Batasuna* with regard to the acceptability of violence amounted to the advancement of a political project which would 'contradict the concept of 'democratic society''[337] and therefore posed a 'strong threat to Spanish democracy.'[338]Consequently, the interference did meet a pressing social need[339] and was proportionate to the legitimate aim pursued.[340] It is the opinion, however, of this chapter that the reasoning adopted by the Strasbourg Court is seriously flawed. Later, this reasoning will be analysed with reference to both the underlying principles of democracy and the aim of protecting a citizenry from political violence. Firstly, however, the argument will be advanced that the evidence presented by the Strasbourg Court would fulfil the requirements of neither a procedural nor substantive approach to party prohibition.

2:3:1:1: Clear and Present Danger?

As the final substantive case study will illustrate, a strictly procedural approach to the question of party prohibitions affords such organizations wide latitude with respect to the expression or advocacy of ideas which challenge or even threaten democratic governance. The jurisdiction that comes closest to an approximate manifestation of such an approach is the United States of America whose Supreme Court has consistently stated that potentially subversive expression should only be subject to restriction when it is deemed to constitute a *Clear and present danger* to either the Constitution or security of the American citizenry.[341] *Clear and Present Danger* has subsequently been subject to an interpretation that distinguishes between advocacies of violence as a component of 'abstract doctrine'[342] which are deemed acceptable and that which produce or are directed at producing 'imminent lawless action' which are

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[336] *Refah Partisi v Turkey* (Grand Chamber) (2003) 37 E.H.R.R. 1, at 98 referenced in *Batasuna,* Op cit, 79
[337] *Batasuna,* Op cit 91
[338] Ibid, 93
[339] Ibid, 91
[340] Ibid, 93
[341] *Schenck v United States* 249 U.S. 47 (1919)
[342] *Yates et al v United States* 354 U.S. 298 (1957) at 318

not.[343]It has also been established that the principles underlying this interpretation apply equally to political parties as well as individuals.[344]

The reasoning adopted by the Strasbourg Court in *Batasuna* takes a much wider interpretation regarding permissible restrictions and thus affords greatly reduced latitude with respect to the acceptability of specific advocacies than that exemplified by the United States Supreme Court. With regard to the actions and behaviours of *Batasuna,* it is noted that the 'acts and speeches of… the applicants do not preclude the use of force to achieve their purpose.'[345] The Court then proceeds to agree with the Spanish Court that the refusal to condemn violence either generally or specifically is evidence of 'tacit support to terrorism'[346] and the use of this element as a ground for dissolution is 'not contrary to the Convention.'[347] Far from inciting 'imminent lawless action', it can be argued that *Batasuna* is being punished at least partially, not for the content of its expression but for what it has not said. This suggests that the dissolution of a political party can be justified not only by the existence of a *clear and present danger* but simply by a refusal to publicly acquiesce in a political consensus sufficiently condemnatory of political violence. While in the post 9/11 era, protection of the polity and citizenry from politically inspired violence is a laudable indeed necessary objective, the act of refusing to condemn an act of violence should be challenged within the political arena of contestation and not utilised as a piece of evidence to facilitate restriction of democratic debate. As Ian Cram has argued, such a position would not only conflict with a purely procedural approach but would be irreconcilable with Convention principles also.

> "Does a refusal to condemn a terrorist action to equate to support for the same? As an independent ground for disbanding a party, the punishment of party officials for not speaking out raises, at the very least issues of compatibility with Article 11…"[348]

The Court is careful, however, to claim that the dissolution is based on more than a

[343] *Brandenburg v Ohio,*395 U.S. 444 (1969) at 447
[344] *Communist Party of Indiana v Whitcomb,* 414 U.S. 441 (1974) at 449
[345] *Batasuna,* Op cit, 86
[346] Ibid, 88
[347] Ibid
[348] Cram, Op cit, 87

failure to condemn or preclude the use of violence. Referencing evidence of speech utilised at party meetings and in newspaper interviews by prominent members that refer to 'struggle'[349] and the 'need to use all instruments to deal with the State',[350] the Court concludes that such behaviour comes extremely close to 'explicit support for violence'[351] and 'praise of …terrorism'[352] and as such represent legitimate grounds for dissolution. By taking this approach, the Court echoes earlier jurisprudence,[353] which held that a lack of strong and immediate disciplinary action by a party against individual members who simply allude to the possibility of using violent methods represents evidence of a propensity towards violence.[354]

> "Hence the Court takes a broad approach in its appreciation whether or not a party promotes violence: explicit calls for violence are not required, ambiguity may suffice."[355]

Once again, Strasbourg's approach diverges greatly from the diminishing procedural approach exemplified in the United States. In attributing legal significance to statements which are at best ambiguous regarding the utility or desirability of violence as a strategic means to political ends, the Strasbourg Court displays an unwillingness to make a distinction between abstract and specific advocacies which (as will become evident later) are applied within the relevant jurisprudence of the U.S. Supreme Court.

However, the identification of major differences between the reasoning of the Strasbourg Court and that of its American equivalent represents a sufficient basis for neither a laudatory nor condemnatory conclusion. When one considers the relative stability of American democracy and its two party system against Spain's recent experiences of political violence and the historic vulnerability of its democracy to civil war, it is unsurprising that the U.S. Courts exhibit a degree of latitude in tolerating subversive advocacy which would be potentially more harmful in a

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[349] *Batasuna*, Op cit, 85
[350] Ibid
[351] Ibid, 86
[352] Ibid
[353] *Refah Partisi v Turkey* (Chamber) (2002) 35 E.H.R.R. 3
[354] Ibid, 72
[355] Brems, Op cit, 166

dissimilar, more fragile political context.[356] A potentially more fruitful avenue is to evaluate the decision to uphold against some of the reasoning applied by the Strasbourg Court in the case of Refah which was the focus of the previous chapter.

2:3:1:2: A twin threat?

As was evident in the last chapter, the Court had previously applied the notion of a 'twin threat' to democracy to justify the dissolution of a political party. In justifying the dissolution of a major Pro-Islamic party in Turkey, the Court argued that the party in question was both committed to an ideology incompatible with Convention principles[357]while its growing influence and popularity meant that it had the real potential to implement such an agenda if elected to government.[358] This combination of ideology and growing popularity represented, in the Courts' opinion, a threat tangible enough to legitimize prohibition.[359] As argued previously, the coherence and potential implications of this reasoning left a lot to be desired. However, even if one were to suspend disbelief and accept the premises of such an approach; in the specific example of *Batasuna,* there existed neither the ideological incompatibility nor level of popular support necessary to justify prohibition on militantly democratic grounds.

Firstly, it is questionable whether the objectives associated with Batasuna represent an ideological threat to democratic governance. While their overriding goal of Independence for a Basque State undoubtedly constitutes a challenge to the specific cultural and territorial basis of the Spanish version of democracy, it does not directly threaten the idea that democracy remains the fundamental principle underlying government. With respect to separatist movements in general, Issacharoff argues that the goal of secession from an existing state is compatible with the idea of the democratic principle of self determination.

> "…they typically do not seek to take control of the entire state through electoral, paramilitary, or any other means. Rather, they seek to challenge the political will of the majority to continue its hold over a distinct region of the country, and they often promote

[356] Samuel Issacharoff, 'Fragile Democracies' in *Harvard Law Review,*Volume 120 (6), 2007, 1421
[357] *Refah* (GC) Ibid, 110
[358] *Refah* (C) Op cit, 77
[359] Ibid, 81-84

> themselves as upholding the claims of a majority of citizens in the contested area to democratic self-determination. Their object is typically independence, not conquest of the entire state. Because of their identification with a broader claim for the rights of a regionally defined, generally subordinated section of the nation, separatist parties readily invoke the language of self-determination to claim independent democratic grounds for their right to advocate dissolution of the broader polity."[360]

Next, with regard to the existence of a strong practical threat; even if one were to accept the contentious proposition that *Batasuna* did explicitly justify the use of violence by ETA, it is arguable whether their continuing participation represented a sustained challenge to the continuation of democratic government. Michel Rosenfeld has argued that whereas the existence of a civil war or the threat of foreign invasion may constitute a crisis for a polity sufficient to justify the temporary suspension of political rights, the existence of terrorist acts (while undeniably a threat to the security of individuals) merely constitute a stress within a polity rather than a full blown crisis.[361] With specific reference to Spain, Cram has noted

> "…the violent actions of *ETA* could not be said to have caused an *institutional crisis* for Spanish democracy in the sense of forcing the postponement of elections or preventing opposing parties standing for election."[362]

With respect to their level of popularity and thus ability to implement their goals, Samuel Issacharoff has argued that as well as being defined as a separatist party, *Batasuna* can also be described as an insurrectionary organization.[363] As an insurrectionary party, *Batasuna* '…participate in the political process for the purpose of propagandizing their views, but without any real prospect of seriously competing for political office.'[364] With little chance of acquiring power at either the regional or

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[360] Ibid, 1437-8
[361] Michel Rosenfeld 'A Pluralist Theory of Political Rights in Times of Stress' in Sadurski, Op cit, 51
[362] Cram, Op cit, 93
[363] Issacharoff, Op cit, 1432
[364] Ibid, 1433

central level, *Batasuna* cannot therefore be argued to pose either a practical or imminent threat to the existence of democracy. Indeed, Issacharoff has argued that the legal standard necessary to justify prohibition for such parties should the *clear and present danger* test which as has been argued above; the example of *Batasuna* fails to meet.

> "Where the danger to democratic stability posed by a party arises from the threat of extralegal conduct, the clear and present danger test properly directs a court's attention to the imminence and likelihood of the harm."[365]

It is contended, therefore, that the decision to uphold the dissolution of Batasuna fails to meet the legal requirements of either a procedural or substantive approach to party prohibition. A subsequent assessment of whether the prohibition can be justified on democratic grounds requires both recognition of the wider political context within which it was set as well as an evaluation of its implications when considered in respect of the four guiding principles.

2:4: Batasuna and the four principles

When one looks at the decision on a superficial level, the decision to uphold can be justified with reference to all four underlying principles. With respect to *popular sovereignty*, it can be viewed as either a legitimate expression of popular feeling or less of a violation than that exemplified in the aforementioned Turkish case. With regard to the latter point, the fact that at the height of its popularity, *Batasuna* only took 10- 20% of the vote for the Basque regional parliament[366] meant that its dissolution constituted a less invasive intervention within a polity than that deployed in Turkey. More fundamentally, the passage of the relevant law on political parties on which the dissolution was based was a clear response to popular concern regarding

[365] Ibid, 1437
[366] 'Profile: Batasuna' –BBC News website- August 27, 2002 available at http://news.bbc.co.uk/1/hi/world/europe/2211696.stm

public safety as evidenced by the fact that it passed through the Spanish Parliament with a 95% majority.[367]

The Strasbourg Court also rejected the applicant's arguments[368] that the dissolution constituted a violation of democracy and political pluralism. It did so by referring to the existence of other separatist parties within the Basque region who share *Batasuna's* aim of independence.[369] It has been argued that the existence of these parties is evidence of respect for the three remaining principles of *equal respect, representation and changeability.* Not only is advocacy of independence regarded as a protected form of expression but those who advocate it are afforded both the opportunity to organize parties and contest elections with the aim of achieving their goal. Those who support the prohibition of *Batasuna* contrast them with other separatist parties not in terms of their ideological vision but on the alleged methods used in pursuing that vision.

> "In Spain, such distinctions are of paramount importance in illustrating that the proscription of *Batasuna* has at its foundation not the prohibition of an ideology but rather of the means employed in promoting that ideology."[370]

In respect of those means, the Court noted that *Batasuna* exhibited 'behaviour very close to an explicit support for violence' as well as a 'refusal to preclude force'[371]as a possible strategic means to political ends. Such action or inaction argue helped 'foster a climate of social confrontation'[372] which in itself can be perceived as displaying at best indifference to the principle of *equal respect.* While it is apparent that the prohibition can be justified with strong reference to the principle of *popular sovereignty* and a superficial nod in the direction of the other three: it is the opinion of this chapter that a wider examination of relevant factors will lead our argument in the

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[367] Katherine A. Sawyer, 'Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna under the European Convention of Human Rights' in *American University Law Review,* Volume 52, (2002-03), 1543
[368] *Batasuna,* Op cit, 61
[369] Ibid, 62-63- Example being the P.N.V. or Basque Nationalist Party
[370] Sawyer, Op cit, 1576
[371] *Batasuna, Op cit,86*
[372] Ibid, 85

opposite direction These factors include a specific examination of the opportunities that separatist movements actually possess to achieve their goal within the framework of the Spanish Constitution and a more general appraisal of whether prohibition is likely to serve as a deterrent to or rallying point for the use of political violence.

Although it is evidently true that other separatist parties are allowed to operate without interference and that regional governments are given a great deal of autonomy[373], it can be argued that pro independence movements are denied an effective means for achieving their goals. According to Article 2 of the Spanish Constitution, there exists an 'indissoluble unity' of the Spanish Nation. Independence for any of the autonomous communities therefore represents an illegitimate goal regardless of the strength of feeling within them.

> "Democracy is defined in Spain by the Spanish Constitution…If you don't accept the Spanish Constitution, you are not democratic. But in the Basque country, there is a clear lack of democracy. The majority would vote for independence…and are being deprived that democratic right."[374]

The Spanish Constitution is not unique. International Law while recognizing a legal right to Self determination[375] has interpreted it in terms of merely allowing colonized peoples to right to 'freely determine their political status.'[376] While some commentators have also suggested that a remedial right to secession exists where there are glaring inequalities between groups concerning rights accessing the political process,[377] there exists no internationally recognized right of secession for distinctive

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[373] See Article 148 of Spanish Constitution

[374] Jabi Arbeo, Batasuna Member quoted in Phil Rees, *Dining with Terrorists*, Pan McMillan, 2005 , 187

[375] International Covenant of Civil and Political Rights (1966) Article 1
International Covenant of Economic, Social and Cultural Rights (1966) Article 1

[376] Diane F. Orentlicher 'International Responses to Separatist Claims: Are Democratic Principles relevant?' in Allen Buchanan and Stephen Macedo, *Secession and Self Determination,* New York University Press (2003), 22

[377] Ibid, 23- The legal bases for this claim come from firstly the Declaration on Principles of International Law concerning Friendly relations and Co-operation among States in Accordance with the Charter of the United Nations. UN Doc A/8018 (1970) which states
"Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described

national groups within existing States. The lack of such a right affords existing states like Spain the ability to legally entrench its jurisdiction over all of its territory regardless of the wishes of the citizens of each of its component parts. While such matters were clearly beyond the remit of the Strasbourg Court in this case, its assertion that the existence of pro-independence parties served as proof of political pluralism ignores the fact that distinct national groups within Spain are unable to access a constitutional exit route. This means that although pro independence parties represent a majority of Basque voters and are allowed to argue and campaign for the achievement of independence within the democratic process, they are denied an effective democratic mechanism for the achievement of their ultimate goal. This represents a clear violation of the principles of both *popular sovereignty* and *changeability.* If one accepts Sartori's claim that democracy depends upon the continuing convertibility of minorities into majorities, then could it not be argued,(to paraphrase Sawyer), that the Spanish Constitution has at its foundation not the prohibition of an ideology but rather of the democratic opportunity to realize that ideology.

2:5 Pragmatic Considerations

In more pragmatic terms, it is also contended that prohibition is likely to be inimical to the specific aim of protecting the citizenry from political violence. While the existence of terrorism unquestionably represents a serious threat to the physical security of a citizenry, it is doubtful whether the dissolution of political parties who either condone or refuse to condemn such acts does anything to actually lessen the threat. Firstly, it can be argued that such steps are unnecessary where there already exist provisions to punish individuals who instigate, praise or incite violent actions.[378] Prohibition in these circumstances amounts to a form of 'collective punishment' and can be viewed a denial of the principles of both *representation* and *equal respect.* Not only does such an action curtail '… the freedom of members to campaign and represent the party, but also the opportunity for like minded voters to express their

above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

[378] For Example, 578, 579 and 581 of Spanish Penal Code

support at the ballot box.'[379] Such an act is also likely to aggravate the sense of injustice and political impotence which may have served as motivation to consider violence in the first place. With specific reference to Spain, the decision by the Strasbourg Courts to uphold the dissolution of *Batasuna* was immediately followed by a renewed campaign of bombing by ETA.[380] While it is true that ETA has now declared a definitive ceasefire, it is doubtful whether this had little or anything to do with the dissolution and more to do with ETA having 'come to terms with its defeat by Spanish and French policing.'[381]

It can also be argued more generally that a decision *not* to proscribe may have beneficial consequences. Within nationalist groups with a propensity towards violence, Cynthia Irvin has recognised a tripartite division.[382] These sub-groups are defined as *ideologues* that hold a steadfast commitment to an armed struggle, *radicals* who combine armed actions with political engagement and *politicos* who prefer a political and bargaining process to that of an armed struggle. To proscribe a political party in such circumstances would run a huge risk of 'defining politics as closing out the political expression of the grievances of the minority' thus undermining the principle of *equal respect*[383] and subsequently strengthening the *ideologues* to the detriment of the *radicals* and *politicos.* Within this context, it is surely legitimate to argue that the movement from political violence to power sharing by the *politicos* within the nationalist community in Northern Ireland was facilitated by the refusal of successive United Kingdom governments to proscribe *Sinn Fein.* As will be argued in the penultimate case study, although the nationalist community in Northern Ireland, (like that in the Basque Region) had alternative vehicles which shared their overriding goal,[384] the UK government's approach recognized the existence of a diversity of opinion within the broad nationalist movement and subsequently allowed both the

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[379] Cram, Op Cit, 69
[380] See Jason Webb and Ben Harding 'ETA blamed for car bomb at Spanish Barracks' in *Mail & Guardian Online,* 29th July 2009 at http://www.mg.co.za/article/2009-07-29-eta-blamed-for-car-bomb-at-spanish-barracks
Also- 'ETA bomb explodes in Majorca' in *Daily Telegraph Online* at http://www.telegraph.co.uk/active/5999413/Eta-bomb-explodes-in-Majorca.html
[381] Giles Tremlett, 'Eta expected to announce definitive end to 4 decades of violence' at www.guardian.co.uk/world/2011/oct/16/eta-end-violence-basque-spain
[382] Cynthia Irvin, *Militant Nationalism,* (University of Minnesota Press), 1999, pp 25-30
[383] Issacharoff, Op cit, 1438
[384] An alternative focus for nationalist aspiration in Northern Ireland is the Social Democratic and Labour Party, (S.D.L.P.)

legitimate expression of diverse forms of nationalist aspiration and the continued possibility of a negotiated settlement to the political cause of the violence. Prohibition in such a context would have made a political solution to the impasse much more problematic.

> '…the ability to negotiate with terrorists becomes more difficult if the authorized face of the group is banished from sight.'[385]

2:6: Conclusion: A disproportionate Step

The case of *Batasuna* is a complex one. The Spanish authorities acted in a manner that clearly reflected a society wide revulsion at political violence. In this regard, it can be argued that the prohibition was a reflection of the principle of *popular sovereignty* rather than a violation of it. That it signalled an alternative strategy to that of the United Kingdom in its dealings with Sinn Fein is explicable in terms of Spain's less stable, more brittle history in relation to the maintenance of democratic norms and institutions. What is less understandable is the approach of the European Court of Human Rights in upholding the prohibition. In effect, it ignored its own previous jurisprudence by validating the prohibition of a party which posed neither a substantial ideological nor a convincingly practical threat to the continuation of democracy. The right of freedom of association is correctly identified by Conor Gearty as one of the most strongly protected elements of political culture.[386] Indeed, with regard to the link between democratic government and political parties, he claims that 'the former is hardly possible without the latter…' It is contended that the specific prohibition of *Batasuna* is illegitimate on the grounds that its continued operation did not represent a sufficient or imminent threat to either collective security or the continuation of democratic government. In the absence of such threats, parties which challenge democratic orthodoxies or even question the assumptions under which the democratic game is played must be allowed to express those doubts. Banning such parties not only represents 'evidence…of the decline of democratic

[385] Leslie Turano 'Spain: banning political parties as a response to Basque Terrorism' in *International Journal of Constitutional Law,* Volume 1(4), 2003, 73
[386] Conor Gearty, *Civil Liberties,* Oxford University Press, 2007-155

freedom'[387] but potentially acts as a further impetus to the use of violence as a political goal.

> 'It is preferable that non-democratic pressures find their expression within the legitimate frameworks of democracy and not outside it.'[388]

To attribute such forms of expression as being outside of the 'legitimate frameworks' of democracy not only denies them *equal respect* in theoretical terms but potentially places the relevant citizenry in more danger through either a continuation of or a retreat back into violent methods. It is contended that such an outcome would constitute a greater violation of *equal respect* than allowing the continued expression of ideas which allude to rather than directly incite violence.

The next two substantive case studies both reflect elements from the cases of Refah and Batasuna but also diverge substantially from them. The next chapter considers the experience of transition democracies emerging from totalitarian systems of both the left and right while the fourth case study examines the political jurisdiction of Israel. Where these examples equate with Turkey and Spain is that at a constitutional and legislative level, they allow for restrictions up to and including prohibition for parties deemed as a threat to either democracy or other established substantive goals. Where they differ however is that while Turkey and Spain have recently taken active steps to apply and enforce these provisions, the provisions in the next two chapters have been sparingly enforced (if at all) and stand more as symbolic manifestations of a desire to protect either democratic decision making or substantive goals judged to be of similar importance.

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[387] Ibid, 156

[388] Justice Barak in E.A. 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi*, 57 (4) P.D. 1 referenced in Navot, Op cit, 761

CHAPTER 3

Militant Democracy and the Politics of Transition

3:1 Introduction

As discussed in the introduction, the theory of Militant Democracy[389] originated as a contemporary response to the seeming ease by which the Nazis destroyed the Weimar Republic from within. Whilst acknowledging that the myriad of economic, social and political factors that led to '…the failure of the democratic experiment are by far too complex to be measured in terms of a single denominator'[390], Karl Loewenstein proceeded to argue that a relative lack of militant measures available within the Weimar Republic as well as an under utilization of those that did exist were the most important factors in explaining the demise of democracy.

> "The German Republic foundered on its own concepts of constitutional legality, which opened the way to power for Hitler. Democracy had surrendered to National Socialism long before Hitler was "legally" appointed Chancellor of the Reich…The one party system was the logical answer to the democratic tolerance of the crushed republic."[391]

The clear implication of this analysis is that in order to protect democratic governance; democracies should both enact and enforce both constitutional and legislative restrictions on those who are unmistakably opposed to the continuation of democracy. Logically, it would also suggest that the existence of relevant defensive measures is particularly appropriate within those democratic polities which exhibit patent if varying degrees of vulnerability. With respect to such measures, Paul Harvey has pinpointed three claims that Militant Democracy advances for itself.[392] Firstly, by

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[389] Karl Loewenstein 'Militant Democracy and Fundamental Rights' in *American Political Science Review,* Volume 37 (3 and 4) reproduced in Andres Sajo (ed) *Militant Democracy,* Eleven International, 2004, 231-262
[390] Ibid, 239
[391] Ibid, 240
[392] Paul Harvey 'Militant Democracy and the European Convention on Human Rights' in *European Law Review* ,Vol 29(3) 2004, 408

taking active steps to restrict the rights of 'anti-democratic actors'[393], it represents a particular type of liberal democracy rather than a departure from it. Secondly, such steps may be necessary to save democracy in the future and may if available have stopped the triumph of Nazism in Weimar Germany. Finally, even though restrictions may not be desirable from a purely democratic standpoint, the alternative is potentially a great deal more troublesome.

> "…while we may question the high ethical cost of militant democracy, if we assume that its second claim as to its own efficacy is true, even such a high cost is preferable in ethical terms to a constitutional suicide pact."[394]

This Chapter will assess the validity of these claims in respect of Constitutions which have emerged from the ashes of totalitarianism and with specific regard to their approach towards the prohibition of political parties; firstly, in post-Nazi Germany and then in relation to a number of the societies which transitioned from communism to democracy after the fall of the Berlin Wall in 1989. An examination will be made of enacted measures relevant to the process of party dissolution and an assessment will be offered concerning the implications of relevant jurisprudence that developed as a direct response to attempts to enforce them. What will become evident is that while there exist major constitutional and legislative provisions within both contexts allowing for the dissolution of political parties; these provisions currently fulfil a primarily symbolic role in that the frequency of their enforcement has declined in a manner proportional to the level of threat the relevant ideologies are perceived to pose within a contemporary setting. It will be contended therefore that these post totalitarian polities have managed to strike a reasonable balance between an embracement of the principle of pluralistic political competition and the need to protect nascent democracy from the real or perceived threat of anti-democratic actors.

> "…the presence of antidemocratic ideologies creates a dilemma for the democratic state. Suppression of these ideologies offends the democratic main principle, yet their presence threatens the survival

[393] Ibid
[394] Ibid, 409

> of a system in which the principle of tolerance is institutionalized."[395]

It is contended that the most appropriate place (within a post-totalitarian context) to begin such an appraisal is where the theory of Militant Democracy first emerged. This requires therefore an examination of the constitutional order[396] that emerged in the Federal Republic of Germany in the immediate post Nazi period.

3:2: Germany and the protection of democracy

That a commitment to democracy permeates the entire German constitutional order can be evidenced in a variety of ways. The principle that is afforded the greatest protection is the 'free democratic basic order'. This phrase occurs several times throughout the Basic Law.[397]It was defined by the Constitutional Court in 1952.

> "The free democratic basic order can be defined as an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self determination of the people as expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include at least: respect for the human rights given concrete form in the Basic Law, in particular for the right to life and free development; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi-party principle; and equality of opportunity for all political parties."[398]

This principle of a 'free democratic basic order' is protected by specific articles within the Basic Law. The intention of these articles is to defend the democratic order by

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[395] Judith Wise 'Dissent and the Militant Democracy: The German Constitution and the banning of the Free German Workers Party' in *University of Chicago Law School Roundtable,* Volume 5 (1998),
[396] Basic Law of the Federal Republic of Germany, 1949
[397] Articles 18, 21(2) and 91(1)
[398] *Socialist Reich Party Case,* 2BVerfGe 1,1952, at 12-13

facilitating the restriction or forfeiture of fundamental rights of those who are deemed to pose a threat to it. For example, Article 18 states

> Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

More pertinently for this chapter, Article 21 on political parties asserts

> (1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.
>
> (2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

This constitutional protection of the ‘free democratic basic order’ is augmented by Article 79 (3) (otherwise known as the eternity clause) which states that the principles reflected in specific provisions can never be amended. These provisions include Article 20 which defines Germany as a ‘democratic and federal social state’. At a general level, therefore, the democratic character of the State seems to be well protected. However, the very existence of such measures poses interesting dilemmas for those committed to fundamental principles of democracy.

3:2:1: Democratic Dilemmas

The definition of a 'free democratic basic order' by the Federal Constitutional Court in 1952[399] offers substantive support to the guiding principles which underlie substantive disagreement. References to 'self determination of the people' and 'will of the existing majority' are consistent with the principle of *popular sovereignty* while adherence to both 'the multi party principle' and 'equality of opportunities for all political parties' seem to fulfil the conceptual requirements of *equal respect, representation* and *changeability.* A closer examination, however, yields a more complex picture. Firstly, by asserting that such an order is premised on fundamental principles which include 'respect for … human rights, in particular…the right …to life' as well as constitutional niceties such as a 'separation of powers', it can be argued that the Court is pursuing a substantive conception of democracy based on contested values which have not acquired universal validity. This represents at least a potential dilution of the principles of *changeability* and *equality.*

With regard to *changeability,* the broad substantive definition of democracy given by the Court potentially allows it to define any proposals which are deemed to contradict this definition as undemocratic and therefore unlawful. The ability of unelected Courts to modify or strike down democratically produced legislation represents a substantial limitation on the principle of democratic *changeability.* Within the specific context of Germany, it can be argued that such potential limitations on democratic change are congruent with and exacerbated by the legal entrenchment of democracy provided by the eternity clause.[400] While, from a democratic perspective, it may seem self evident that a legal entrenchment of democracy against itself provides 'a compelling defence of immutable law',[401] the ability of a Court to determine what constitutes a democratic order may inhibit a specific democracy's ability to develop organically.

> "…we must bear in mind that entrenchment of a provision as vague as a regime type may empower the constitutional court to determine

[399] Ibid
[400] Article 79(3)
[401] Melissa Schwarzberg, *Democracy and Legal Change,* Cambridge University Press, 2009, 190

> the contours of what, precisely, a [democracy] entails, with the distributive consequences and the irreversibility such a decision might entail."[402]

With regard to the principle of *equal respect*, the implications of the Court's broad definition of what constitutes 'the free basic democratic order' are potentially troublesome. This arises from the fact that Articles 18 and 21 allow for the forfeiture or restriction of the rights of those who are deemed to pose a threat to such an order. With specific regard to political parties, Article 21 is worthy of examination. In conjunction with the German Court's broad interpretation of principles fundamental to democracy, this specific provision confers wider latitude for prohibition than those countries which suffered similar degradations during the relevant historical era.

In both Italy[403] and Austria,[404] laws relating to the prohibition of political parties specifically ban those associations which were in power during the 2nd World War.[405]By contrast, the framers of the new German Basic Law evidently took the view that a wider defence against all forms of totalitarianism was necessary.

> "Arguably, the lessons to be learned from a historical experience of the overthrow of democracy concerns the vulnerability of democracy vis-à-vis its enemies in general, rather than the threat posed by one specific anti-democratic ideology. Hence, an effective translation of this lesson into legal provisions requires measures of a more general nature."[406]

Consequently, Article 21(2) allows for the prohibition of parties that 'by reason of their aims or the behaviour of their adherents seek to undermine or abolish the free democratic basic order...' In doing so, it gives the Constitutional Court the authority to restrict the political rights of those it deems to pose a threat to its own conception of a free basic democratic order. Such wide latitude raises legitimate concern as to how

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[402] Ibid, 190-91
[403] *'Legge Scelba'* Law 645 of 1952
[404] *Verbotsgesetz,* Prohibition Law of 1947
[405] Fascist Party and NSDAP respectively
[406] Eva Brems, 'Freedom of Political Association and the Question of Party Closure' in Wojciech Sadurski , *Political Rights under stress in 21st Century Europe,* Oxford University Press, 2006, 153

effectively the principle of *equal respect* will be observed. However, any judgement as to whether this or any other principle has been violated requires a move beyond the textual provisions of the Constitution to an analysis of the jurisprudential reasoning that has emerged out of cases based on them.

3:3 German Prohibition Cases

The monopoly of jurisdiction and apparently wide latitude afforded to the Federal Constitutional Court with respect to the banning of political parties must (like the emergence of the theory of Militant Democracy itself) be placed in a proper historical context. While giving an unelected Court the power to ban vehicles of popular representation undoubtedly raises questions relating to democratic principles, the experience of Weimar Germany where an elected party and executive had destroyed the democratic rights of its opponents places such a decision in a more understandable light. Indeed, it has been argued from within this context that the decision to afford the judiciary exclusive jurisdiction in this respect should be viewed as recognition of the vital importance of political parties to democracy and a subsequent need to afford them greater protection from potential opponents than had existed before.[407] However, in spite of, and perhaps because of, this general desire to protect political parties who are committed to democratic means and ends, the Constitution betrays an understandable indisposition to parties which might possibly be deemed to threaten the new democratic order. This attitude is reflected in Article 21(2) of the Basic Law and has been given jurisprudential support by Constitutional Court.

> "Article 21(2) … expresses the conviction of the [drafters], based on their concrete historical experience, that the state could no longer afford to maintain an attitude of neutrality toward political parties. [The Basic Law] has in this sense created a "militant democracy," a constitutional [value] decision that is binding on the Federal Constitutional Court."[408]

Despite this constitutionally recognized indisposition towards anti-democratic parties, it is instructive to note that only two parties have been banned under the provisions of

[407] Wise, Op cit, 308
[408] *German Communist Party (KPD) Case*, 5 BVerfGe 85, 1956 at 139

Article 21; parties who both had links with overtly totalitarian ideologies and who were operating at a time of vulnerability for the new Federal Republic.[409]

3:3:1: *Socialist Reich Party*

The Socialist Reich Party was banned by the Constitutional Court in 1952[410] Founded in 1949; it had achieved moderate levels of support in elections to State or *Lander* parliaments.[411] It was clearly a successor party to the Nazis in terms of ideology and membership.[412] While the ban was seen as politically uncontroversial at the time,[413] the Court's reasoning to justify the ban is less so. Rather than simply tying the party's professed ideology to the assertion within Article 21(2) that 'aims or…behaviour' which 'seek to impair or abolish the free democratic order' are grounds for a finding of unconstitutionality, the Court utilized the wording in Article 21(1) that a party's internal organization must 'conform to democratic principles' as the main justificatory ground for dissolution. The Court stated that political parties

> "…must be structured from the bottom up, that is, that the members must not be excluded from democratic processes and that the basic equality of members…must be guaranteed."[414]

The Court then used the lack of internal democratic procedures within the SRP to argue that this betrayed a clear anti-democratic desire to 'impose its own organizational structure on the state.'[415] While it is certainly true that internal party democracy is a German constitutional requirement and that parties indisposed to democracy inevitably lack such structures, the utilization of such as the main justificatory ground for dissolution of a party sets a potentially dangerous precedent. As Samuel Issacharoff has argued,[416] an insistence on internal democracy might make parties based on 'fixed principles' such as religious parties vulnerable to prohibition. He also contends that such a requirement may forestall the development of political

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[409] Samuel Issacharoff, 'Fragile Democracies' in *Harvard Law Review*, Volume 120(6), 2007, 1433-34
[410] *SRP Case*, Op cit
[411] Markus Thiel 'Germany' in Thiel (Ed)*The Militant Democracy Principle in Modern Democracies*, Ashgate, 2009,121
[412] *SRP Case*, Op cit, at 602, 604
[413] Thiel, Op cit
[414] *SRP Case*, Op cit at 602 and 604
[415] Ibid, 604
[416] Issacharoff, Op cit, 1462

movements originally based around the popularity of a leader (for example-Peronism in Argentina) into mass parties.[417] An insistence on internal democracy is suggestive of unwarranted state intrusion into the affairs of organizations which serve as important intermediaries between the citizen and the state.

> "…because parties are not the state, the need for pluralist competition in a democratic society does not necessarily require the same pluralist competition within all of the contending parties…There appears to be no compelling reason why we should demand that all parties adhere to the same internal structure as long as the ultimate objective is meaningful voter choice and the capacity to vote politicians out of office."[418]

While the lack of internal democracy within the SRP constituted the main legal ground for its dissolution; it is difficult to believe that this represented the main reason for its prohibition. Again, the historical context is illuminating. As Samuel Issacharoff has argued, the Socialist Reich Party was banned because it served as a symbol of a recent anti-democratic and grotesque past. Prohibiting them served as a counter symbol of the new polity's determination not to return there.

> "At the end of the day, the simple, compelling fact was that this was a party of Nazis, complete with a heroic worship of the "Reich," serious elements of anti-Semitism, and a conspicuous refusal to disavow any link to the Hitler government. It was these specifics, in the context of post-war Germany that placed the SRP outside the bounds of democratic tolerance."[419]

The reasoning used in the *Socialist Reich* case can therefore be viewed as a clumsy attempt to justify prohibiting a specific temporal threat on grounds of general democratic principle. The potential problem arising from such reasoning is that a requirement of internal party democracy might potentially allow for the restriction of

[417] Ibid
[418] Ibid
[419] Ibid, 1462-63

future parties which do not threaten democracy as such but simply challenge the contested conception of democracy evident within the Constitution. Therefore, there exists a fundamental disconnect between the political reasons underlying prohibition and the legal grounds presented to justify it. It is contended that the second prohibition case also exemplifies a similar detatchment.

3:3:2 *Communist Party (KPD)*

While the prohibition of the SRP was relatively uncontroversial, the dissolution of the German Communist Party in 1956 inspired heated debate.[420] Perhaps in cognisance of this reality, the Court took steps within its reasoning to characterise prohibition not as an aggressive instrument with which to silence political dissent but as an *ultima ratio,* a weapon of last resort against the activities of a party bent upon the destruction of democratic governance.

> "Therefore, a party is not unconstitutional if it does not acknowledge the supreme principles of a free democratic basic order, refuses them, or sets them against other [principles]. An actively combative aggressive attitude against the existing order must be present; it has methodically to affect the functioning of the order and aim for the abolition of this order over time. This means that the free democratic state does not proceed against hostile parties by itself, but acts in defence, repelling attacks against its fundamental order."[421]

In its subsequent reasoning, the Court found that such an attitude could be attributed to the KPD. The Court argued that as a Communist Party, the KPD adhered to Marxist-Leninist ideology whose ideological goal of a dictatorship of the proletariat was fundamentally hostile to a free democratic order.

> "In the parliamentary system of liberal democracy, each party participating in forming the popular political will is to be given a

[420] Thiel, Op cit
[421] *KPD, Op cit, at 141*

> chance to come as close as possible to achieving its own goals through its activity in parliament. But no party may pursue material goals that, when reached, would forever exclude existence of other parties… But ... this is exactly the KPD's goal."[422]

Again, it can be argued that the reasoning adopted by the Court is somewhat unsatisfactory. Firstly, by banning a party on the basis of its overall Marxist-Leninist ideology, it was effectively arguing that there was no longer room within the polity for ideas '…that had certainly formed part of Germany's intellectual legacy.'[423]Also, in a similar fashion to the *SRP* decision, the argument used by the Court hid rather than illuminated the historically specific reason for prohibition. This was the perceived threat of communist East German forces at the border during the height of the Cold War.

> "Under these circumstances, the Communist Party became more than an electoral outlier and instead assumed the role of an ally of forces seeking to unwind the German democratic state, not through elections as such, but in conjunction with a real foreign threat."[424]

That this specific prohibition was linked to the perceived practical danger as opposed to the dangers of Marxist-Leninism *per se* is evidenced by the Court's own contention that 'banning the KPD is not incompatible with the reauthorization of a Communist Party were elections to be held throughout Germany.'[425] This, as Isacharoff has noted, constituted 'a clear invitation to revisit the Court's holding outside of the context of the Cold War',[426], an assertion given further credibility by a corresponding lack of action taken against a newly constituted Communist Party in 1968. This particular example of inaction occurred within the context of a period of economic growth which proceeded alongside and may have contributed to a perceived dilution of the threat from the East.[427]

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[422] Ibid at 624
[423] Issacharoff 2007 Op cit at 1434
[424] Ibid, 1435
[425] KPD, Op cit at 626
[426] Issacharoff, Op cit
[427] Ibid

When taken together, the legal reasoning adopted by the Court in these two cases seems to portend and potentially set a precedent for subsequent highly restrictive interventions. However, despite this and the continuing legal availability of prohibition, there has been a subsequent dearth of attempted and a complete lack of successful prohibitions. This suggests that as the perceived threats to the continuation of the polity that inspired the 1950's cases have receded so has the inclination to apply prohibitive measures. It indicates that the 'Militant Democracy' established by the Basic Law of 1949 has matured and consolidated to a point where it can be viewed as a tolerant albeit defensive democracy rather than an aggressive interventionist mechanism which some of the disjointed reasoning applied in the 1950's cases gave it an opportunity to be.

The remainder of the chapter will examine some of the relevant restrictions and jurisprudence that have emerged from other transition polities; specifically those who moved out of the shadow of Soviet communism in the early 1990's. It will contend that in a similar vein to post war Germany, these polities have armed themselves with the legal weapons to defend democracy but in the main have utilised them extremely sparingly if at all.

3:4 Post Communist Polities

One of the potential difficulties that any newly emerging democracy faces is to establish democratic competition as the norm. There is a danger that the electoral arena simply becomes a playground within which old enmities battle for State power and that once achieved, the winning party uses such power to restrain or even remove the prospect of continuing competition. With reference to the newly independent countries that emerged from the de-colonization process in the years after the 2nd World War, Samuel Issacharoff has noted

> "In country after country, the dispiriting lesson of experiments in democratic rule was that elections were a brief transition between the overthrow of colonialism and the rise of one-party or one-man autocracy. If anything, the elections served primarily to legitimate

> the control that one faction had on state authority as it went about the often violent task of eliminating its political opponents."[428]

With regard to the potential vulnerability of a newly functioning democratic order, it would be reasonable to argue that those societies in Eastern Europe which emerged from Communist rule in the early 1990's are potentially susceptible to an attack from within. With specific concern to a threat from a reconstituted Communism, Eva Brems has argued that

> " If 'threat' is the main criterion, there are good reasons to argue that the threat of communism is more serious in today's post communist states, where communist parties may still have a substantial basis of support among the population, or a potential of easily winning it back, for example in times of severe economic crises."[429]

In addition to the potential threat posed by a reconstituted Communism, Andras Sajo has identified a further two 'foundational'[430] risks to post-Communist democracies. These are a growth in extreme nationalist movements or ethnicity based political groupings alongside a 'partly related'[431] resurgence in right wing extremism. In recognition of the existence of these foundational risks, an examination of the new post-communist constitutions reveal a variety of provisions infused with similarities to those adopted by the 'militant democracy' of post-war Germany. These provisions exhibit a desire to protect democratic governance from both a general misuse of majoritarian power as well as specific manifestations of perceived threats in the form of political parties.[432]

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[428] Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' in *New York University School of Law Public Law and Legal Theory Research Paper Series,* March 2010, 5 available at http://ssrn.com/abstract=1580211

[429] Brems, Op cit, 155

[430] Andras Sajo 'Militant Democracy and Transition towards Democracy' in Sajo (ed) , *Militant Democracy*, Eleven International, 2004, 217

[431] Ibid, 218

[432] Jiri Priban and Wojech Sadurski, 'Democratization of Central and Eastern Europe' in Sadurski, *Political Rights under Stress in 21st Century Europe*, Oxford University Press, 225

3:4:1 Constitutional Provisions

In general terms, the new Constitutions have attempted to guard against the danger of unrestrained majoritarianism by *inter alia,* organizing the new electoral mechanisms as manifestations of the principles of proportional representation and with the exception of Estonia[433]created superior courts (Supreme or Constitutional) with the power to 'enforce the democratic commands of the constitution.'[434] Just as the introduction of proportional representation can be viewed as a defence mechanism against an unwarranted accumulation of power by one political party or bloc, the creation of newly formed courts can help 'protect the vitality of democratic competition'[435]by upholding the rights to expression and association of those who find themselves in a temporal minority.

> "…the role of constitutional courts as a buffer against unchecked majoritarian power in the first stages of democratic rule alters the dynamics of the initial constitutional balance. Courts may emerge as a pole of independent authority ensuring a corrective against the inherent frailties of democracy. At the stage of constitutional formation, the argument runs, the creation of constitutional courts alters the political equilibrium and results in a greater margin of protection for political and other minorities. At the very least, the presence of such courts makes it more difficult for the first generation of political rulers to disregard the terms of the founding political balance."[436]

With specific respect to political parties, Priban and Sadurski[437] have noted that those who framed the post Communist democratic constitutions had to deal with two conflicting political impulses. Firstly, the 'unfortunate experience with one party rule'[438] meant that there existed a tendency to celebrate the principles and stress the importance of a pluralistic party system. On the other hand, there was a corresponding recognition that the move from a Communist system to a democratic and capitalist

[433] Issacharoff, (2010), Op cit, 6
[434] Ibid
[435] Ibid,4
[436] Ibid, 49
[437] Jiri Priban and Wojech Sadurski, Op cit
[438] Ibid, 225

society and the consequent social and economic turmoil may act as a stimulus for the growth of anti-democratic and extremist groups (similar to those referenced by Sajo) from which the new democracy might need protection.

> "On the other hand, social dislocation combined with the ideological vacuum left by the demise of an all-encompassing orthodoxy posed fertile ground for anti-democratic, often extremist organisations, aiming to cater for the needs of large numbers of disillusioned and impoverished voters."[439]

This fear of a return to totalitarianism inspired a number of the new polities to follow the example of Germany and not only establish a clause entrenching a system of democratic government[440] but also adopt '… relatively wide ranging means of regulating parties based on their potential to threaten democracy.'[441] With specific regard to political parties, the inherent tension between the desire to celebrate and yet at the same time place limitations on the principle of political pluralism is evident in many of the relevant constitutional provisions. The Bulgarian Constitution, for example, states that while parties 'facilitate the formation and expression of the citizens' political will',[442] it also asserts that 'there shall be no political parties on ethnic, racial or religious lines, nor parties which seek the violent seizure of state power.'[443] Similarly, while the Constitution of the Czech Republic asserts that its political system 'is based on the free and voluntary foundation and free competition of political parties',[444] it proceeds to assert that such parties must 'respect the fundamental democratic principles' and renounce force as a means of promoting their interests.'[445] The Polish Constitution states that the purpose of political parties 'shall be to influence the formulation of the policy of the state by democratic means'[446] but then goes on to place substantial limits on the type of party allowed to influence state policy.

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[439] Ibid
[440] For example –Article 152 of the Romanian Constitution and Article 9 of the Czech Republic
[441] Priban and Sadurski, Op cit
[442] Constitution of the Republic of Bulgaria 1991, Article 11(3)
[443] Ibid, Article 11(4)
[444] Constitution of the Czech Republic 1992, Article 5
[445] Ibid
[446] Constitution of the Republic of Poland, 1997, Article 11

> "Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of Nazism, Fascism and Communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership shall be prohibited."

While it can be argued that the constitutional provisions celebrating pluralism reflect the principles of *popular sovereignty* and *representation,* what is clear from the provisions establishing limitations to pluralism is that the requirements of constitutional legitimacy for parties are evidently substantive. Consequently, such provisions allow for parties to be deemed constitutionally illegitimate on the basis of their profession of particular views and goals. The danger to the principles of *equal respect* and *changeability* is self evident. Political parties may be prohibited not because they necessarily pose a fundamental threat to the continuation of democratic government but that they simply challenge either a 'dominant national ideology'[447]or the interests of those currently in the political ascendancy.

> "…a ban on [a] party on the basis that its aims are unconstitutional may simply be a disguised attempt to entrench the political status quo by those benefitting most from current constitutional arrangements."[448]

However, despite the existence of a number of constitutional opportunities for the regulation or prohibition of anti-democratic actors, there has been a noticeable lack of enthusiasm for putting such restrictions into practice.[449] This means that there exists a relative dearth of jurisprudence in support of prohibition. Indeed, most of the relevant judicial reasoning errs on the side of protecting rather than restricting the rights of parties. A corresponding and perhaps contributory factor to the lack of enforced restrictions is that even when they are applied by a post communist Constitutional

[447] Harvey, Op cit, 410
[448] Priban and Sadurski, Op cit, 227
[449] Ibid, 228

Court, they are almost always adjudged by the European Court of Human Rights to have constituted a violation of the Article 11 right of freedom of association. Two relatively recent cases with regard to Communist parties illustrate these reinforcing trends.

3:4:2: Relevant Cases

In 2001, a ten year old ban on the Communist Party of Ukraine (CPU) was revoked by the Ukrainian Constitutional Court.[450] The initial ban had been enforced by executive decree in the days after Ukraine had declared its independence from the Soviet Union. The newly formed CPU was adjudged to be a continuation of the Communist Party of the Soviet Union (CPSU) and was perceived therefore in the light of an attempted coup against Mikhail Gorbachev in Moscow to constitute a threat to Ukrainian independence. [451] The leadership of a subsequent reconstitution of the Communist Party (with 139 MPs)[452] fought unsuccessfully to legislatively overturn the ban throughout the 1990's but successfully petitioned the Court to accept the case in 1997.[453] The Court invalidated the decade old ban as an infringement of the constitutionally protected right of freedom of association.[454] It justified its decision on two grounds. Firstly, it found that the CPU's charter promised to 'follow the laws and the Constitution.'[455] Secondly, it found that the party which had been registered as a regular party in July 1991[456] was a newly constituted party which was independent of the old CPSU which was deemed illegitimate as it had '…retained its leadership from the Soviet era.'[457]

The background to and reasoning applied within this case suggests acknowledgement of the diminishing nature of the perceived threat of Communism. The fact that a

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[450] *Decision of Constitutional Court of Ukraine* no 20-RP/2001-For a detailed account of the background to and substance of the Court's reasoning see- Alexei Trochev, 'Ukraine: Constitutional Court Invalidates Ban on Communist Party', *in International Journal of Constitutional Law*, (2003), 534-40

[451] Trochev, Ibid-535

[452] Ibid-536

[453] Ibid- The motivation for overturning the ban was partly financial as the newly constituted CPU claimed ownership of the original CPU's property.

[454] Ibid, 538

[455] Decision no 20-RP/2001, paragraph 7 referenced from Ibid

[456] Ibid

[457] Ibid

newly constituted Communist party with significant electoral support were advocating a reversal of the ban is indicative of a toleration of Communism as a legitimate political viewpoint within the Ukrainian polity. The distinction made by the court between the Communist party of the Ukraine and that of the Soviet Union suggests that the level of the perceived threat of Communism is directly related to the current status of Ukraine's historically difficult relationship with Russia or the old Soviet Union and not with the intricacies of Marxist-Leninist doctrine.

A similar tolerance of Communist ideology has been exemplified by the European Court of Human Rights. In the case of *Partidul Communistilor v Romania,*[458] the Strasbourg Court found that the refusal of the Romanian authorities to register a Communist party in 1996 constituted a violation of Article 11 of the Convention.[459] This decision is in line with other related jurisprudence. Following the guidelines of its own Venice Commission,[460] the Court has consistently argued that in the absence of evidence relating to the use of violence or other undemocratic measures, adherence to a specific ideology does not constitute a sufficient basis for party closure.[461] In regard to the specific Romanian case, the Court argued that while 'Romania's experience of totalitarianism'[462]meant that the restriction met the legitimate aims of 'being in the interests of national security and for the protection of the rights and freedoms of others', it represented an unjustified interference in the pursuit of legitimate political aims and ideas.

> "…that context by itself cannot justify the need for the interference, especially as communist parties adhering to Marxist ideology exist in a number of countries which are signatory to the Convention."[463]

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[458] *Partidul Communistilor v Romania,* (2007), 44 E.H.R.R. 17
[459] Ibid, at 61
[460] *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures,*CDL-INF(2000)001 at www.venice.coe.int/docs/CDL-INF(2000)001-e.html
[461] Ibid, Guideline 3- A notable exception to this reasoning occurred in the *Refah Partisi* cases *Refah Partisi v Turkey* (No 1) (2002) 35 E.H.R.R. 3

Refah Partisi v Turkey (No 2) (2003) 37 E.H.R.R. 1where it was contended that an ideological commitment to Sharia law was incompatible with Convention principles. These cases were be discussed in detail in a previous chapter

[462] *Partidul Communistilor*, Op cit, at 37
[463] Ibid at 58

The trend of an increasing tolerance towards Communist parties might (as in Germany) be partially explained by the lack of a specific and contemporary threat equal to that posed by the presence of the Soviet Union. However, this geopolitical reality evidently does not provide an explanation as to why 'militant' measures have not been frequently applied against extreme nationalist or right wing groupings. It is to this question that the chapter now turns.

3:5 Explanations for Inaction

The disparity between the availability of restrictive measures within transition democracies and the infrequency of their utilization cannot be explained in terms of an absence of extremist organizations. In a number of post-communist polities, there are examples of neo-Fascist, anti-Semitic and anti minority parties successfully campaigning and electorally prospering. Examples include the league of Polish Families who in 2001 acquired 7.9% in parliamentary elections and reached a high point of 15% in elections to the European Parliament in 2004[464]and the Movement for a Better Hungary (Jobbik) which achieved 16.7% in the first round of Hungary's 2010 parliamentary elections.[465] The prominence of some of these groups suggests that an alternative explanation for the relative lack of prohibition is required.

Priban and Sadurski offer three complementary explanations.[466] Firstly, they argue that given most of these countries' recent totalitarian pasts, there exists a 'clear and legitimate aversion'[467] to the utilisation of restrictions against political parties. Secondly, they argue that there exists a deeply held view that anti-democratic parties should be defeated and confronted within a political rather than legal arena. This view (with clear reference to events that occurred in Weimar Germany) is partly conditioned by the fear that legal restrictions may provide extremist groups a judicial forum out of proportion to their actual influence which could then be used to create a perception of martyrdom which would assist in the spread of their ideology.[468] These two explanations reflect the existence of '…good faith disagreements within post

[464] Anti-Defamation League '*Poland: Democracy and the Challenge of Extremism'* (2006) available at www.adl.org/international/PolandDemocracyandExtremism.pdf
[465] *Swing right, Sweet Hungarian Election Chariot: First Round Election Results* available at http://www.cafebabel.co.uk/article/33185/hungary-right-first-round-election-eu-press-review.html
[466] Priban and Sadurski, Op cit, 229
[467] Ibid
[468] Ibid

communist states on the limits of justified tolerance for extremists and those who are themselves intolerant.'[469] The third and final explanation is, however, potentially more troublesome. It is that the dearth of attempted prohibitions may be related to 'a hidden indirect sympathy for the programmes of extremist parties and movements'[470] both within the corridors of power and society at large.

> "In [post communist states] as universally, tolerating the intolerant is often not based on principled liberalism but driven by purely pragmatic considerations…or on a degree of identification with the intolerant."[471]

Whatever the differing motivations underlying relative inaction and as Priban and Sadurski note 'the borderline between[them]…are fluid',[472] the potentially questionable nature of some of them should not necessarily be used as an argument in favour of more concerted action. While these parties may profess ideas or present policies which are premised on a denial of the principle of *equal respect*, a subsequent refusal to legally tolerate political organization around such ideas would represent an arguably greater violation of the same principle. As Eva Brems has argued such a policy may also have negative symbolic effects and be counter-productive.

> "The first few years of democracy after transition have an educational function, and radical measures such as party closure may give a repressive impression and suggest that in terms of political freedoms, the new regime is not all that different from the old one."[473]

It is evident that with regard to parties perceived to hold extreme nationalist or right wing views, the actions or lack thereof of relevant authorities within post-communist policies have largely assuaged such concerns. The dominant trend within post-communist polities has (for conflicting reasons) been a non or under utilization of

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[469] Ibid
[470] Ibid
[471] Ibid, 229-230
[472] Ibid, 229
[473] Brems, Op cit, 155

available restrictive measures. Recent events in the Czech Republic, however, suggest a tentative step in a more restrictive direction.

3:6: The Worker's Party Case

In 2010, the extreme right Worker's Party[474] was dissolved within the Czech Republic. In February, the Supreme Administrative Court made the decision[475] to dissolve the party by judicial resolution, a decision upheld by the Constitutional Court in May.[476] Founded in 2002, the party was for the first few years of its existence 'one out of several inconsequential groupings of the extreme right whose short-term alliances usually ended in personal and ideological disputes.'[477] In 2007, it formed an alliance with 'neo-nazi militants'[478] who 'were looking for a political platform that would allow them to penetrate into the party system'.[479] In 2008, the party established paramilitary units which, though unarmed, clashed with representatives of the Roma community and police numerous times throughout the remainder of 2008 and the early months of 2009.[480] These incidents raised the party's profile and in the European Elections of 2009, it received just over 1% of the popular vote,a percentage which although relatively miniscule made it 'eligible to receive funding the state provides for political parties.'[481] In response to petitions received by concerned anti-racist groups and organizations representing the Jewish and Roma communities, the government initiated proceedings through the courts to dissolve the party.[482]

3:6:1 Legal Context of Dissolution

The Constitution of the Czech Republic[483] states that

> "The political system is founded on the free and voluntary formation of and free competition among those political parties which respect

[474] (Delnicka Strana or DS)
[475] Pst 1-2009 (2010)
[476] Pl. US. 13/10 (2010)
[477] , Miroslav Mares 'Czech Militant Democracy: Dissolution of the Workers' Party and the wider context of this Act' in *East European Politics and Societies,* Vol 20(10), 6
[478]Ibid - Autonomous Nationalists (Autonomni nacionaliste, AN) and National Resistance (Narodni odpor, NO)
[479] Ibid
[480] Ibid
[481] Ibid
[482] Ibid
[483] Constitution of the Czech Republic, 1992, Sb 1/1991

> the fundamental democratic principles and which renounce force as a means of promoting their interests."[484]

It then proceeds to establish the right of citizens to '… form political parties and political movements and to associate therein.'[485] However, limitations may be placed on the exercise of this right if such measures are deemed'… necessary in a democratic society for the security of the state, the protection of public security and public order, the prevention of crime, or the protection of the rights and freedoms of others.'[486] In addition to this loose constitutional framework, there also exists a law on association in political parties and movements[487] which allows for a judicial resolution mandating dissolution if the party in question has objectives or indulges in activities which *inter alia* breach the Constitution,[488] endanger public order or civil rights[489] or involve the establishment of armed units.[490] It was on the basis of these legal provisions that the relevant courts justified their findings that dissolution was appropriate.

3:6:2 Judicial Reasoning

In the original decision to dissolve the extreme right workers' party,[491] the Supreme Administrative Court argued that dissolution represented a warranted interference with associational rights. Firstly, the continued toleration of the party would threaten the rights of others as its programme

> "…has as its objective inciting national, racial, ethnic and social intolerance and, as a consequence, an attempt to limit the basic rights and freedoms of certain groups of Czech Republic's inhabitants, especially minorities (typically Roma, but also

[484] Ibid, article 5
[485] Czech Republic, Charter of Fundamental Rights and Freedoms Sb 2/1993 incorporated into Constitution in 1999, Article 20(2)
[486] Ibid, Article 20(3)
[487] Law no 424/1991 sb
[488] Ibid, Article 4(a)
[489] Ibid, Article 4(d)
[490] Ibid,, Article 5(2)
[491] Pst 1-2009 Op cit

> Vietnamese and Jewish, plus immigrants more generally and individuals of different origins, skin colour or sexuality).”[492]

Secondly, the party also fundamentally breached the intent behind Article 5 of the Constitution. Rather than respecting the principle of free political competition, the party ‘in asserting its interests…does not renounce violence, its activities incite this violence and the party also publicly approves and glorifies violence committed by its members and sympathisers.’[493] The Constitutional Court in upholding the dissolution argued that constitutional protection of an equal political right to contest the processes of popular sovereignty of freedom of association is itself contingent on the adoption of ideas and behaviours premised on equal respect.

> “This free competition should be understood primarily as a competition of thoughts, ideas and conceptions of how to administer the modern state at the beginning of the 21st century and how to face the challenges brought by that era. It should not therefore consist in setting the various groups of inhabitants against each other, in adoration of violence or in flooding the public space with poison. We must always face the evil, irrespective of the form it assumes.”[494]

Whether the decision to abolish the worker’s party represents the first step towards a more consistent utilisation of restrictive legislation or merely a blip within an established tradition of non-utilisation still remains to be seen. Supporters of the decision may contend that while an equal right to participate within the processes of popular sovereignty has undoubtedly been subject to interference, contemporary opinion polls suggested that over 75 % of the population supported dissolution of the Workers Party and any party committed to ‘racial intolerance, xenophobia and innate violence’[495] thus giving popular support to a broader and deeper statement on the importance of equal respect. Detractors such as the liberal journalist Peter Zantovsky echo the earlier observations of Priban and Sadurski in criticising the ban in terms of

[492] Ibid referenced in Mares, Op cit, 11 and 12
[493] Ibid referenced in Ibid, 12
[494] Pl.US. 13/10 referenced in Ibid, 12
[495] Mares, Op cit, 15

its limitation of genuinely free debate and its potential to counter-productively create martyrs of what was ostensibly an electorally insignificant rump.

> "Bans, restrictions, persecutions, arrests, street skirmishes—this is the proper territory of extremists, this is the place where they become perfectly visible and our media will gladly provide them with space on their front pages. In addition, the leaders of the party will draw above their heads the halo of those who suffer for their convictions. And this is where it gets really dangerous. There is only one way: if we want to strip bare the Workers' Party and similar groups, let them speak. Let them say freely what they have to say. It is only in a free discussion that the true content of their rhetoric becomes apparent, and a discerning citizen can then make a free choice—and I also believe that it will be a reasonable one."[496]

3:7 Conclusion: Transition Democracies and the Four Principles

When analysed together, it is evident that the militant democracy of Germany and the post-communist transition societies of Eastern Europe display similar characteristics. Given their common totalitarian past, it is perhaps understandable that there exists within the relevant constitutions, measures facilitating the prohibition of political parties ostensibly for the purpose of defending their own explicitly substantive conceptions of democracy. While the availability of such restrictions undoubtedly raises conceptual challenges to the four guiding principles, their inclusion within democratic constitutions drafted within the temporal shadow of a recent totalitarian past is both understandable and mainly symbolic. The fact that, for the most part, the relevant Constitutional Courts have been spared the task of grappling with these difficult questions due to a relative paucity of attempts at prohibition lends a degree of credence to this analysis.

It is contended that the relatively small number of attempted prohibitions warrant a finding that the four principles presently co-exist in a balance amenable to the

[496] Petr Žantovsky, K čemu vede zakazovani mitinků DSSS? (Česky rozhlas, 2010), http://www.rozhlas.cz/komentare/portal/_zprava/721152 translated and referenced in Ibid

continued existence of substantive disagreement. In the case of Germany, the lack of relevant cases since the 1950's signifies a consolidation of democracy as well as a corresponding diminution of a perceived threat. The diminution of a perceived threat from the ideologies of totalitarianism has facilitated a greater tolerance within the polity for ideas premised on radical change. Consequently, there has been a gradual acceptance that holders of such views should be afforded equal rights to seek representation for them by contesting the processes of popular sovereignty. In eastern Europe, while it has been argued that the tendency not to enforce prohibition measures against the extreme right is a sign of 'condemnable leniency'[497] towards viewpoints which potentially erode the principle of equal respect in relation to specific social issues: it is contended that an aggressive approach which utilises prohibition in the early years of democracy is likely to be counterproductive to the aim of upholding and defending the very same system against its potential enemies. Prohibition by overtly stating that the processes of both collective deliberation and popular sovereignty are not equally open to all would potentially undermine the public legitimacy of democracy as a whole. More specifically, it might convince holders of radical views that their political goals can only be achieved or even represented by resorting to methods premised upon a fundamental denial of equal respect.

The following jurisdiction of Israel exhibits a large degree of similarity with the jurisdictions discussed in this chapter. As is the case with them, Israel has clear legislative provisions allowing for restrictions on political parties. Also, like the relevant jurisdictions, these provisions have been extremely sparingly enforced. They differ however in a couple of distinct ways. Firstly, the reason for the sparing enforcement of legislative provisions within Israel have less to do with a lack of political will emanating from a recent totalitarian history but by the existence of a high evidentiary threshold established in case law by the country's Supreme Court to protect relevant rights from potentially over-zealous politicians. Secondly, the restrictions enshrined in Israeli Law are more concerned with the right to contest elections rather than the right to organize and campaign around a set of shared ideals.

[497] Priban and Sadurski, Op cit

CHAPTER 4

Israel: The distinction between words and actions

4:1 Introduction

The adoption of either a purely procedural or substantive approach to the question of party prohibition is problematic. An entirely procedural approach seems indifferent to the dangers that popular anti-democratic movements potentially pose to democracy at large. As will be evidenced later, it is surely no coincidence that those modern democracies (such as the US and UK) which principally utilise a procedural approach tend to be free of large influential anti-democratic political movements. Conversely, an equation of democracy with particular substantive ends as has been evident in the jurisdictions of Turkey and Spain facilitates a reduction in their areas of democratic contestation by tolerating the suppression of parties like Refah and Batasuna who do not adhere to a particular temporal consensus. Such a contention both exposes and reflects the real dilemmas at the heart of the issue of party prohibition.

> "Democracy may be in jeopardy because of 'underprotection', because the enemies of democracy are treated leniently, and because state intervention, conditioned on there being clear and present danger, may come too late to be effective. On the other hand, an activist self defending democracy may pose dangers of democratic 'overprotection', of encroachment on free speech, and of also applying this policy against democratic opponents of a regime."[498]

This chapter will briefly revisit this dilemma and will argue that an examination of relevant Israeli law and its subsequent application by the country's Supreme Court reveals a fundamental difference in the approach taken by the main legislative and judicial bodies[499] which is illustrative of the opposing paradigms in the debate surrounding the legitimacy of restrictions. It will assert that while the relevant Israeli legislation that allows for exclusion display clear signs of 'militancy', recent

[498] Benjamin Neuberger 'Israel' in Markus Thiel (Ed), *The 'Militant Democracy' Principle in Modern Democracies,* Ashgate, 2009, 205

[499] The Knesset and Israeli Supreme Court respectively

interpretation of these laws by the Israeli Supreme Court utilises a clear distinction between words and action which places the relevant jurisprudence within a mainly procedural paradigm. It will also contend that the Israeli practice of allowing parties deemed illegitimate to continue organizing and campaigning while excluding them from the electoral arena also rests on a fundamental distinction between words and actions but on one which defines actions on a more speculative, less stringent legal standard than that applied by the Court.

4:2: Procedural v Militant Democracy revisited

In a book chapter published in 2009.[500] Benjamin Neuberger distinguishes between the procedural and militant schools of thought in terms of geography. He argues that proceduralism can be described as an 'American' approach whereas a more militant approach is designated as a 'European' characteristic. As we will see in the final substantive chapter, the U.S. Supreme Court has primarily adhered to a procedural approach. It is also evident from the jurisdictions examined thus far that a more militant approach has emerged and has mainly been applied within Europe. However, the variety and complexity of approaches applied within the continent of Europe mean that such a distinction is not entirely accurate. A more accurate and explanatory distinction also utilised by Neuberger is between a 'diminishing' and 'expanding' approach.[501] 'Diminishing' denotes reducing or strictly limiting the number of legal restrictions on expression and association in order to uphold democracy while the contrasting 'expanding' approach is clearly prepared to defend democratic governance by increasing the application of similar restrictions.

Those who align themselves to a diminishing approach argue that there can be 'no democracy without risks.'[502] They argue that democracies must allow for the expression of 'anti- democratic' views as the harm done to democracy by prohibiting such speech outweighs any potential harm inflicted on democracy by allowing such expression. Tolerating anti-democratic expression will protect democracy by allowing the holders of such views to have their opinions publicly aired and thus defuse the

[500] Ibid, 184-205
[501] Ibid, 203
[502] Claus Leggewie and Horst Meier, *Republikshultz,*Rowohlt, 1995, 20 translated in ibid, 186

possibility that such citizens will be pushed towards covert and potentially violent activity.

> "But can a democracy be tolerant in its defence against anti-democratic tendencies? It can to the extent that it must not suppress the peaceful expression of anti-democratic ideas. It is just by such tolerance that democracy distinguishes itself from autocracy. We have a right to reject autocracy and to be proud of our democratic form of government only as long as we maintain this difference. Democracy cannot defend itself by giving itself up."[503]

Central to this argument is a fundamental distinction between words and actions. Freedom of expression is considered inviolable and must be defended at all costs and at all times. This is to be contrasted with freedom of action which cannot be defended if relevant acts are either criminal and/or violent. Conversely, proponents of a militant or expanding approach argue that there is often a logical connection that can be made between both the expression of words and commission of actions and consequently an unrestricted tolerance of anti- democratic expression presents a stronger threat to democracy than targeted and specific legal restrictions.

> " The guardians of self-defending democracy are aware of the danger that a self defending democracy may glide along the slippery slope toward dictatorship, but they agree that the dangers of an absolutist 'purist' approach democracy granting its gravediggers all the rights and tools is often much greater."[504]

It is evident, therefore, that the debate concerning whether or not a clear distinction can be made between the effects of words and actions is often utilised to support either a diminishing or expanding approach towards party prohibition. In general terms, while a link between word and action is often sought to justify the restriction of political rights; support for the contention that a clear distinction exists between word

[503] Hans Kelsen (1935) quoted in Ibid and translated in Neuberger, Op, cit, 186
[504] Neuberger, Op cit

and action has often been used to invalidate the legitimacy of legal restrictions on expression and association. What is interesting about the Israeli polity is that while such a distinction has been utilised by the Supreme Court to invalidate legislative restrictions on specific forms of political association; a similar distinction has been applied by the legislature to justify the existence and of the very same restrictions.

4:3:Israeli Law on Political Parties

Contemporary Israeli statutes on political parties effectively set up a system of 'double review'[505] where a party can be disqualified at two distinct stages. These are at the time of initial registration and at election time where party lists can be excluded from contesting elections to the Knesset. With regard to the latter, Section 7A of the Basic Law relating to elections to the Knesset states

> "A list of candidates will not take part in the elections to the Knesset nor shall an individual person be a candidate for the Knesset if the goals or deeds of the list or the deeds of the person explicitly or implicitly are one of the following:
>
> 1 reject the existence of the State of Israel as a Jewish and democratic state;
> 2 incite to racism;
> 3 support the armed struggle of an enemy state or a terrorist organization against the State of Israel."

While the stated grounds for excluding a party list from the electoral process and their implications will be discussed in detail later, what is interesting from a comparative perspective is that disqualification at initial registration requires additional necessary conditions than those required for electoral exclusion. Specifically, Section 5(3) of the Parties Law of 1992 states that a decision not to register must also be based upon a finding that

[505] Suzie Navot 'Fighting Terrorism in the Political Arena: The banning of Political Parties' in *Party Politics*, Volume 14(6), 2008, 746

> "…any of its purposes or deeds, implicitly or explicitly contains…reasonable grounds to deduce that the party will serve as a cover for illegal actions."

The requirement to establish a direct link with unlawful conduct to justify disqualification at the initial registration stage is suggestive of recognition that absolute prohibition of a political party is an inherently more draconian measure than simply forbidding it from competing within the processes of popular sovereignty. Consequently, the subsequent gap in protection at these two distinct stages can be viewed as '…inviting courts to apply a more stringent standard before a party is outlawed altogether and a less rigorous standard when a party is being merely disqualified from having its members elected to the Knesset.'[506] Such an approach, while consistent with the procedural view that restrictive measures require proof of illegitimate actions as well as words, raises new and fundamental questions. It clearly allows a situation where although parties are allowed to exist, recruit and organize themselves around what are deemed to be 'reprehensible' ideas[507], they are simultaneously denied the opportunity to contest elections and acquire the political power necessary to put such ideas into practice. This, according to Samuel Issacharoff

> "…leads directly to the question whether democracies may regulate the political arena on a basis distinct from that underlying the regulation of speech, association and assembly generally."[508]

This question has clearly been answered in the affirmative by Raphael Cohen-Almagor.

> "In a nutshell: I see significant difference between the right to free expression and the right to be elected to parliament. We cannot and

[506] Samuel Issacharoff, 'Fragile Democracies' in *Harvard Law Review*, Volume 120(6), 2007, 1449
[507] Ibid
[508] Ibid, 1450

> we should not employ the same standards of tolerance for both. Simply put: words are different from ability to legislate. Therefore, a wider scope of tolerance is reserved for free expression than for free election. " [509]

While a distinction between words and action has traditionally been applied to invalidate legal restrictions on political parties, a similar distinction is utilised here in order only to justify restrictions on parties within the electoral arena. However, actions are defined, not in respect of attributable criminal or illegal conduct, but in terms of the potential power to effect undesirable legislation that access to the electoral arena and public office may bestow.

> "Both the existence of the State and its democratic regime are basic conditions, and only when these conditions are present can the right to be elected (and to elect) like other rights be taken into account…They should therefore be ensured, and defending them against those seeking to subvert them is justified even when doing so violates the right to be elected." [510]

Part of this fear within an Israeli context may lie in the fact that Israel has an electoral list system that is almost purely proportional and subsequently produces a Knesset 'that reflect(s) almost exactly the various political divisions of the electorate.'[511] While a purely representative legislative body may be considered a good thing, the fractured nature of such representation makes it potentially more difficult for a governing majority to be established and thus increases the possibility that the views (extremist or otherwise) of smaller parties may be given consideration out of proportion to their support within the whole electorate as a possible price for

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[509] Raphael Cohen Almagor, 'The Scope of Tolerance: Response to Nehustan' in *Israeli Law Review*, Volume 40(1), 2007, 290

[510] Mordechai Kremnitzer 'Disqualification of lists and parties: The Israeli Case' in Andres Sajo, (ed), *Militant Democracy*,(Eleven International), 2004, 161

[511] Andrea Carla, 'Pointless Representation': the Tyranny of the Majority in Proportional Electoral Systems'- paper presented at Annual Meeting of *American Political Science Association*, September 2006, 4

participation within or at least support of a prospective coalition government. Those in favour of an 'expanding approach' towards restricting participation within the processes of popular sovereignty argue that it is better to deny electoral and consequently legislative representation to extremist parties than allow them (in the context of specific election results), a position of undue prominence and influence.

> "It bears mentioning that different electoral systems or thresholds may be crucial variables in explaining the legal means taken by different democracies to ban certain parties. Hence the United States, with its plurality single member districts and strong two-party system, and Germany, with its 5 percent threshold, enjoy good structural protection from extreme elements in parliament. Israel, with its highly proportional system and low threshold, enjoys no such protection."[512]

However, while these specific contextual factors may help partially explain the Israeli practice of excluding party lists from the electoral arena; acknowledgement of such factors does not necessarily grant the process of electoral exclusion a consequent legitimacy. Indeed, it is contended that the effects do not necessarily achieve a satisfactory balance between the four principles of democracy.

4:3:1: Electoral Exclusion and the Four Principles

In general terms, it can clearly be argued that exclusion from the electoral arena is a less restrictive measure than outright abolition and as such is more respectful of the principle of *equality* in that the individuals associated with relevant parties are still afforded rights of expression and association. It does, however, indisputably represent a diluted principle of *equality* which arguably brings more attention to the potential violation of the other three principles. Exclusion from the electoral arena constitutes a clear dilution of the principles of *representation* and *changeability* in that adherents of what are deemed to be extremist views are denied the opportunity to both challenge for and attain public office and achieve temporal legislative recognition of such ideas. With regard to the specific principle of *popular sovereignty,* while the denial of an

[512] Navot, Op cit, 747

opportunity to compete at the ballot box represents an obvious deviation, a full and informed evaluation of whether a major violation of the principle has taken place may depend upon an informed assessment of either or both the popularity of the party in question (which may be well nigh impossible due to its exclusion) or the attitude of the public at large towards the relevant prohibition.

A more accurate and informed evaluation of the efficacy and legitimacy of the Israeli approach, however, must combine both a general overview of the system with a specific examination of both the relevant legislation and jurisprudence which has emerged from the Israeli Supreme Court's interpretation of statute. It will be contended that while the relevant legislative provisions represent an expanding approach threatening to democratic principles; for the most part, the Israeli Supreme Court have utilised a 'diminishing' methodology more consistent with underlying democratic values.

4:3:2: Establishing Statutory Grounds for Exclusion

In 1984, the Israeli Supreme Court invalidated a decision by the Central Elections Committee to deny participation in forthcoming elections to the Eleventh Knesset to party lists from both the left and right of the political spectrum which the Committee deemed to be too extreme.[513]The decision[514] to invalidate was based at least partially on the absence of a specific legal directive sanctioning such actions. The absence of a relevant statutory provision was held to constitute a violation of the political rights of the relevant parties and subsequently their participation in the elections was secured.

In response to this decision, the newly elected Knesset quickly legislated for an amendment[515] to Section 7A of the Basic Law: Knesset. This amendment established legal grounds on which the electoral exclusion of entire party lists could be justified.

[513] 'Progressive List for Peace' and 'Kach' respectively
[514] EA 3/84. *Neiman v Chairman of Central Elections Committee for the Eleventh Knesset* 39 PD (2)225 (1985) referenced in Kremnitzer, Op cit 158
[515] Basic Law: The Knesset (Amendment 9), 1985

The newly amended law stated that

> "A list of the candidates shall not participate in Knesset elections if any of the following is implied or expressed in its purposes or deeds:
>
> 1. Denial of the existence of the State of Israel as the State of the Jewish people;
> 2. Denial of the democratic character of the state;
> 3. Incitement to Racism."

Mordechai Kremnitzer has suggested that the amendment essentially represents a political compromise between left and right factions within the Knesset who desired a legal basis for the disqualification of party lists of which they did not approve: on one hand those who promoted or incited racism and on the other those who argued for the negation of Israel as a Jewish state.[516] It can similarly be argued that subsequent decisions to exclude are also essentially political in nature in that the authority to disqualify is entrusted to a Central Elections Committee which is composed of elected Knesset members whose party allegiance is in rough proportion to that of the Knesset as an entire body.[517] While it is true that the Committee is chaired by a Supreme Court Justice and that its decisions are subject to review by the Court, an argument can be legitimately advanced that '…allowing politicians to decide the qualification of other politicians for parliamentary membership is an idea that is structurally flawed."[518] The potential for tension between the stated goal of ensuring the continued democratic character of the state and opportunities for politicians to restrict those who oppose them is clearly evident.

> "Thus, one of Israel's primary legal means of enshrining its…democratic character allows for politically dominant blocs to

[516] Kremnitzer, Op cit
[517] Website of Israeli Knesset- 'Central Elections Committee' available at www.knesset.gov.il/elections16/eng/about/cec_eng.htm
[518] Mordechai Kremnitzer, 'Disqualifying the Arab Lists' January 29, 2009 available at www.idi.org.il/sites/english/OpEds/Pages/DisqualificationoftheArabLists.aspx

> alter the boundaries of political inclusion whenever and however they see fit."[519]

In 2002, Section 7A of the Basic Law: Knesset was amended again to what is its present form. This was in large part a response to both a renewed period of political and societal upheaval as well as the immediate post 9/11 political climate.[520] Its present formulation states

"A list of candidates will not take part in the elections to the Knesset nor shall an individual person be a candidate for the Knesset if the goals or deeds of the list or the deeds of the person explicitly or implicitly are one of the following:

1. reject the existence of the State of Israel as a Jewish and democratic state;
2. incite to racism;
3. support the armed struggle of an enemy state or a terrorist organization against the State of Israel."[521]

An argument can be advanced that the grounds on which electoral exclusion can be legally justified present major challenges to the principles underlying the very democracy they are designed to protect.

4:3:3: Potential Implications of the present form of Section 7A

Prior to the amended law listing the specific legal grounds on which a party can be disqualified from contesting a national election, it initially asserts that a party can be banned if its 'goals or deeds' can be implicitly or explicitly deemed to meet at least one of the three stated criteria. Therefore, Section 7A clearly states that a party list can be excluded from the electoral arena on the basis of its implied goals as well as its explicit actions. Such an assertion clearly places the relevant legislation within a militant or expanding paradigm. Disqualification on the grounds of ideological goals

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[519] Armen Rosen 'Immature Democracy: For Israel, Constitutionalism is a matter for Survival' in *The Current: a journal of Contemporary Politics, Culture and Jewish affairs:* Spring 2009 available at www.columbia.edu/cu/current/articles/spring2009/rosen.html , Paragraph 28

[520] Discussed in more detail later

[521] Basic Law (Amendment 35), 2002

is not only a substantive violation of *equality* in that it discriminates against parties which adhere to specific ideas, it also subverts the principles of *popular sovereignty*, *representation* and *changeability* by effectively diluting the value of arguably the most central democratic right of all.

> "…disqualification also violates the freedom to vote: a group in the population whose values lead it to identify with the ideology of the rejected list will be unable to vote to the best of its consciences and preferences."[522]

With regard to the specific grounds for disqualification, a number of issues are worthy of discussion which also contain implications for the four guiding principles crucial to the epistemic virtues of democracy.

Ground1: rejection of existence of the State of Israel as a Jewish and Democratic state

Whether one aligns themselves to a procedural/diminishing or militant/expanding approach to party prohibition or disqualification, it is self evident that the continuing existence of a functioning State with a democratic system constitutes a necessary if not sufficient condition for the overall protection of democratic rights. Subsequently, parties who therefore profess an ideological commitment to or indeed take concrete actions towards the eradication of the existing State and/ or its democratic character may leave themselves vulnerable to disqualification.

> "It is the elementary right of every state to maintain its very existence and freedom, both against external enemies and those who follow from within…One cannot ask any government for the sake of freedom of association to accept the formation of a Fifth Column within the state's borders." [523]

[522] Kremnitzer, 2004, Op cit, 161
[523] Justice Moshe Landau, Concurring Opinion in High Court 253/64, *Sabri Jeryis v Haifa District Commissioner*, 1964

However, the conflation of the democratic character of the state with its Jewish identity raises troubling questions from a democratic perspective. While its Jewish identity may indeed be perceived as both a 'constitutive' and 'defining' feature of the contemporary state,[524] an attachment to Judaism is not necessarily synonymous with its continuing existence. Subsequently, any attempt by a political party to remove or alter such an attachment cannot be equated with a desire to endanger the very existence of the State. Allowing for the electoral exclusion of a party on any grounds represents at least a dilution of the principles of *popular sovereignty* and *representation*. To do so on the grounds that a party refuses to recognise or adhere to the Jewish character of the State represents not only a dilution of but also a substantive violation of those of *equality* and *changeability*.

As Armen Rosen has argued[525], contemporary Israeli Society is clearly divided with 'a growing… gulf between [its] secular and religious Jews, as well as between its Jewish and Arab citizens.'[526] Within such a context, a legal requirement to respect the Jewish nature of Israeli democracy represents a clear violation of the principle of *equality*. Firstly, such a requirement clearly leaves parties who represent the minority Arab population in a more vulnerable position. Secondly, depending on how the word 'Jewish' is interpreted, there is also the potential for a deficit in protection between those who define their Jewishness primarily in relation to religion and those who do so with respect to ethnicity.

> "The identity of the state is a subject within rather than beyond the democratic discourse. The state's founders have no acquired right to determine its character in perpetuity, determining, for instance, ties with a specific church, a specific religious quality, or the absence thereof. These are highly meaningful and vital questions, which cannot be excluded from the democratic discourse without deeply violating the essence of democracy."[527]

[524] Kremnitzer, Op cit, 2004, 162
[525] Rosen, Op cit, paragraph 12
[526] Ibid
[527] Kremnitzer, Op cit 163

With regard to *changeability*, the legal requirement to accept the Jewish nature of the state represents an effective entrenchment of Judaism as a defining characteristic. This clearly inhibits the prospect for democratically inspired change.

> " It could be argued…that in any democracy [parties] should be allowed to strive to change the character of the state, as long as it is done in a democratic way, and as long as the purpose is not to abolish democracy."[528]

Ground 3: Support of an armed struggle or a terrorist organization against the State of Israel

At first glance, this particular provision seems unproblematic. Disqualifying those whose main aim is the destruction of the State seems both a necessary and proportionate defensive measure. However, more careful scrutiny reveals issues which potentially raise fundamental questions relating to the Israeli democracy's ability to ensure a healthy diversity of opinion.

Firstly, Kremnitzer has noted in relation to Israeli foreign and military policy,[529]it might be possible under the law to disqualify a party list which challenged specific Israeli military operations. A potential example[530] that he offers is of a party list which demands the withdrawal of Israeli Defence Forces from Southern Lebanon on the grounds that their presence is both a violation of Lebanese sovereignty and international law. He proceeds to argue that such a position could also logically legitimize and sanction an armed response by the Lebanese government in defence of their country. Such an argument could possibly be defined as 'support for an armed struggle … against the State of Israel' and therefore be used as a legal basis for disqualification. While such a scenario may seem politically unlikely given both the diversity and strength of opinion that exists within the Israeli polity in relation to its foreign and military policy, the essential point made is that the law as presently constituted may allow (in times of relative agreement and consensus) politically

[528] Neuberger, Op cit, 123
[529] Kremnitzer, Op cit, 166-67
[530] A prescient example considering the events of 2007

dominant forces to disqualify those who present an electoral challenge to the existing consensus. The potential threat to the principle of *changeability* is clearly evident within such a scenario.

Next, the use of the terms 'implicit' and 'goals' in conjunction with 'support… for a terrorist organization' raises similar issues as to those which will discussed in the following chapter with respect to the UK's criminalisation of the 'glorification' of terrorism. If 'support' is defined in terms of an abstract attachment to the use of violence in the past, present or future, such a definition may potentially used a means for circumscribing access to the processes of *popular sovereignty* by specific sections of the electorate thus diluting the Knesset's purpose of accurately reflecting all shades of opinion within the polity. Finally, with regard to equality; the interpretation of terrorism as an act which is solely directed at the 'State of Israel' allows for the possibility that support (whether active or tacit) for right wing violence against the minority population may be afforded greater protection than that directed against either the state directly or against the majority Jewish population.

> " Focusing on the armed struggle against the state implies that a Jewish political body that engages in terrorism against Palestinian citizens (without inciting racism) is politically legitimate- *per se* a problematic consequence, both in regard to the phenomenon of terrorism, which is unjustifiable, and in regard to the equality principle."[531]

In summary, it is evident that the relevant statute concerning grounds for electoral disqualification can be placed squarely within a militant or expanding approach to legal restrictions. Not only does it dilute the principles of *popular sovereignty* and *representation* by allowing for exclusion at all, detailed scrutiny of the ideological goals that may under the law warrant disqualification reveals a less than full commitment to the principles of *equality* and *changeability.* However, such a contention does not necessarily place Israel squarely within a militant paradigm.

[531] Kremnitzer, Op cit, 167

While it is incontestable that Section 7A allows for a substantive approach towards legal restrictions, the next section will illustrate that the Israeli Supreme Court's interpretation of the relevant provision is indicative of a more complex picture. Early cases seem consistent with the militant or expanding approach exemplified within current legislation. However, recent jurisprudence demonstrates a clear intention to proceed in a primarily procedural or diminishing direction.

4:4: Supreme Court Jurisprudence

4:4:1: Disqualification on the basis of a Party's goals

The earliest cases that the Supreme Court had to deal with in regard to party prohibition or disqualification clearly exhibit a tendency towards a militant approach.

In 1964, a refusal to register an Arab Socialist Party known as El-Ard[532] was upheld on the grounds that its professed goal of 'national self determination for the Arab people in the whole of Palestine'[533] was interpreted as 'a denial of the legitimacy of the existence of the State of Israel.'[534] One year later, the outlawed group formed a new party known as the Socialist List with the purpose of contesting the Knesset elections of 1965. The Supreme Court upheld a decision of the Central Elections Committee to disqualify the party list for similar reasons as those expounded a year previously.[535] However, what is unusual about the decision is that in upholding the decision to disqualify, it can be argued that the Court arguably sanctioned a deviation from the principle of the rule of law.[536] Whilst recognizing that no positive statutory provision existed allowing for disqualification relating to a party's goals, the Court applied what was deemed to be to be 'Supra-Constitutional principle'[537]

> "Just as a man does not have to agree to be killed, so a state too does not have to agree to be destroyed and erased from the map. Its

[532] *Sabri Jeryis*, Op cit
[533] Neuberger, Op cit, 189
[534] Ibid
[535] EA 1/65, Yeredor v Chairman of Central Elections Committee for the Sixth Knesset 19 PD (3) 365 , 1965
[536] Navot, Op cit, 748
[537] Neuberger, Op cit, 190

> judges are not allowed to sit back idly and to despair from the absence of a positive rule of law when a plaintiff asks them for assistance in order to bring an end to the state. Likewise, no other state authority should serve as an instrument in the hands of those whose perhaps sole aim is the annihilation of the state."[538]

The first substantial deviation from this approach came in 1984 when the Central Elections Committee disqualified the *Kach* party. This party,under the leadership of an extreme right wing Rabbi called Meir Kahane, had previously argued in favour of policies that included the forcible deportation of Arabs, prohibition of marriage or sexual relations between Arab and Jew and the establishment of a theocratic Jewish State.[539] The decision to disqualify was rejected by the Supreme Court on the grounds that no law existed at that time which justified disqualification for the profession of racist or anti-democratic views.[540] It was further argued that the precedent established in the Socialist List case was not relevant as supra-constitutional principles only applied with regard to parties who denied the state's right to exist.

> "There must always be a logical connection between the degree of danger and the means taken; and not any advocacy, even if it raises a justified indignation, may cause the denial of the entire scope of liberty. A democracy that activates restrictions without existential necessity…loses its spirit and force."[541]

What the contrasting approaches exhibited by these two cases illustrate is that in the absence of positive law that specifically provided legal bases for electoral exclusion, there is a protective deficit for parties of the extreme left compared to those of the extreme right. Neuberger has convincingly argued why such a gap may have existed.

> "While the Arab Nationalist threat is perceived as a threat to the very existence of the state or to its existence as a Jewish state, and only indirectly as a threat to democracy, the threats of the Jewish

[538] Justice Yoel Sussman, *Yeredor*, Op Cit, in Ibid
[539] See Neuberger, Op cit, 192
[540] E.A. 3/84 Op cit
[541] President Meir Shagmir, Ibid, 279

> extreme right are perceived as a direct threat against the democratic regime and not in any way a threat against the state and its Jewish character."[542]

As previously discussed, it was partly in response to the failure to disqualify *Kach* that the 1985 amendment to the Basic Law was adopted. Subsequently, a further decision by the Central Elections Committee to disqualify the *Kach* list from the 1988 elections was upheld by the Supreme Court on the grounds that the goals and deeds of prominent party members provided clear evidence of both incitement to racism and a desire to replace a democratic system of government with a theocracy.[543] On a superficial level, the decision by the Court to uphold disqualification would seem to indicate the continuation of a militant or expanding approach. However, the Court adopted preconditions for disqualification which were more in keeping with a procedural or diminishing template. This specific case is of vital importance because the relevant elements created by Justice Shamgar during it have been 'adopted since then by the Court in all its rulings concerning disqualification of list and parties.'[544] In summary,[545] the Court argued that in order to serve as a basis for disqualification, the illegitimate goals identified within the Basic Law must be dominant and constitutive factors of party doctrine. While the relative dominance of specific goals may be inferred from official party declarations and policy platforms, a mere abstract theoretical attachment to these goals does not suffice as a basis for disqualification unless accompanied by 'persuasive, clear and unequivocal' evidence[546] that 'continued and consistent'[547] actions have been taken in pursuit of the achievement of such goals.

> "The court demands proof that the list of candidates 'is working to promote its goals for the purposes of transforming them from an idea into reality'[548]… As such, according to the case-law of the Israeli Court, no list can be disqualified purely on the basis of its

[542] Neuberger, Op cit, 188
[543] E.A. 1/88, *Naiman et al. v. Central Elections Committee*, 42 (4) P.D. 177.
[544] Kremnitzer, Op cit, 168 fn 23
[545] For a more detailed explanation see Ibid, 168-170
[546] E.A. 1/88 referenced inIbid, 169
[547] Ibid referenced in Ibid, 168
[548] Ibid, 196

> goals…The Supreme Court gave a negative answer to the question of whether a party can be disqualified exclusively on the basis of its illegitimate ideology and stressed the additional need for proof of its acts and activity."[549]

4:4:2 Support for Terrorism

Between 1996 and 2002, the leader of the 'Balad' (Democratic National Assembly) Party, Dr Azmi Bishra emerged as a polarizing figure within the Israeli polity.[550] Not only did he make several controversial statements regarding Israel's right to exist as a Jewish homeland, he also travelled to many Arab Countries considered enemy states. It was during a visit to one of these countries, Syria in 2001, that he expressed support for the terrorist group, Hezbollah and its policy of 'resistance' to Israel in Southern Lebanon. This visit and pronouncement took place amidst a violent uprising (*intifada*) by the Palestinian people within the occupied territories. This uprising included the use of suicide bombings against Israeli citizens.[551] Given such a febrile atmosphere and in the immediate post 9/11 climate, it is perhaps unsurprising that the Basic Law regarding disqualification was again amended to include 'support' for the 'armed struggle of an enemy state or terrorist organization against the State of Israel.'[552] On the basis of this amendment, the Balad List was disqualified for the 2003 Knesset elections. However, the Supreme Court overturned the decision by a margin of 7-4.[553]

> "The Court ruled that the statements attributed to MK Bishara did indeed express support for a terrorist organization, but it had not been proven with the required degree of certainty that Bishara supported the 'armed' struggle of a terrorist organization, and as such he could not be denied the right of candidacy in the Knesset elections."[554]

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[549] Navot, Op cit, 752
[550] For a concise summary of his words and actions see Navot, Op cit, 750
[551] Ibid
[552] Basic Law Amendment 35, Op cit
[553] E.A. 11280/02 Central Elections Committee for the Sixteenth Knesset v. Tibi, 57 (4) P.D. 1
[554] Navot, Op cit, 751

With respect to what constitutes 'support' for an armed struggle, the Court stated that

> "This support may be material, in which case it is tantamount to actively participating in the struggle. This support may be political . . . this kind of political support may take different forms, all of them conferring legitimacy to the armed struggle against the state."[555]

While there is an absence of a clear definition of what constitutes political support, the Court's subsequent reference to a need to identify 'activity on the ground'[556] as a ground for upholding disqualification suggests that in a similar vein to the question of a party's pursuit of ideological goals, disqualification requires proof of action as opposed to an abstract theoretical commitment. This approach was given further reinforcement by the reasoning employed in two exclusion cases heard in 2009.

4:5: The 2009 Cases

In a case decided in January 2009, the Supreme Court overturned a decision by the Central Elections Committee to disqualify both the Balad and Ra'am Ta'al party lists for the Knesset elections of that year. The reasons for the decision to overturn the disqualification were not published until March 2011.[557] The original decisions to disqualify the two lists were made in the Central Elections Committee by votes of 28 out of 38 and 21 out of 38 respectively.[558] The grounds for disqualification were that both parties were allegedly committed to the 'rejection of Israel's existence as a Jewish State' and 'support for the armed struggle of a terrorist organization.'[559] However, the Court overwhelmingly rejected the decision to exclude these parties from the forthcoming elections on the basis of an 8-1 vote in the case of Balad and a unanimous vote with respect to Ra'am Ta'al.[560]

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[555] E.A. 11280/02, Op cit, 57
[556] Ibid
[557] Summary of Israeli Supreme Court Decision: Election Appeal 561/09, Balad and Ra'amTa'al v. Central Elections Committee for the 18th Knesset Judgment issued 7 March 2011 published on adalah website at http://www.adalah.org/upfiles/Summary_of_SCt_Decision_Election_Appeal_2009.pdf
[558] Ibid, 1
[559] Ibid
[560] Ibid

The Court's reasoning delivered by Chief Justice Beinisch paid deference to the militant provisions of Basic Law 7A but nevertheless continued with the Court's previous procedural approach by asserting that 'a cautious and very limited approach should be used, and strict requirements – legal and actual should be defined before making a decision to disqualify a party.' [561] These legal requirements include an assessment whether the alleged goals of the relevant party lists were 'dominant characteristics…central to the list's aspirations or activities'[562] and not simply 'marginal things whose impact on the ideological and operational whole is neither significant nor serious.'[563] With respect to the assessment of the alleged goals as dominant characteristics, the Court reinforced previous rulings that in order for disqualification to be justified, there had to be 'convincing, clear and unequivocal evidence'[564] that the relevant party lists not only aspired to these goals but were acting in a consistent and concerted fashion to realise them.

> "Theoretical goals alone are not sufficient and a distant objective of an abstract nature set by a list competing [for the Knesset] is also not enough. It is necessary to show that a list is acting to realize goals charted in its platform and to put its ideas into practice. For the purpose of examining the de facto activity of a list, sporadic activity is not sufficient. Rather, there must be repeated and systematic activity that is expressed in a way that is severe and significant in its strength." [565]

With respect to the specific parties in question, the Court found very little 'evidentiary infrastructure'[566] to uphold the exclusions. In the case of Balad, the quality of evidence was less than had been presented in the previous Balad case[567]and 'even by inference it was not proven… that the party should be disqualified based on these grounds.'[568]With regard to Ra'am Ta'al, the Court found that the relevant evidence

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[561] Paragraph 3 of Justice Beinisch Ruling referenced in Ibid, page 2
[562] Justice Shagmar in E.A. 1/88 *Naiman et al. v. Central Elections Committee*, 42 (4) P.D. 177 (1988)
[563] Ibid
[564] Justice Beinish ruling Paragraph 4 referenced in Summary EA 561/09 and Neiman EA 2/84 and Neiman 1/88 Op cit
[565] Ibid
[566] E.A. 561/09 at 3
[567] E.A. 11280/02 op cit
[568] Chief Justice Beinisch, Op cit, at paragraph 19

constituted 'even much less'[569] than that presented in support of the exclusion of Balad and subsequently that disqualification could also not be upheld.

The Court also made serious criticisms of the Central Election Committee with respect to its original decisions to disqualify. It stated that there had been 'no in-depth' discussion of the evidence at hand and that the Court's criteria with respect to upholding disqualifications 'formulated' in previous rulings 'were not examined.'[570]Any discussion which did take place was 'conducted in the format of slogans without establishing a sufficient evidentiary infrastructure as mandated by the seriousness of this issue.'[571] In making these criticisms, the Court apportioned at least partial responsibility to the 'political' nature of the committee thus expressing disquiet about the potential prospect of politicians utilising power to restrict opponents (which were expressed earlier in the chapter).

> "In addition, and as we already noted in the previous ruling by this court, the committee is a political body by its makeup, and its considerations are clearly political. This fact affects – even if only potentially – the extent of objectivity and seriousness of the discussion held in its framework. In the circumstances of the matter before us, it appears that this potential was realized, because here too it is evident that the guidelines and criteria stipulated in the court rulings were not given proper consideration when adopting the far reaching step of disqualifying lists from competing in elections."[572]

While the formal decisions by the Courts focus on the evidential basis for the application of the relevant law, it would be unrealistic to imagine that political and social considerations have played no role in the Court's transition to a more procedural diminishing approach. With respect to the twin goals of both protecting democratic governance and reducing the incidence of terrorism, it is certainly conceivable that the Court views the potential damage that party disqualification may inflict in terms of a'potential alienation' of the Arab minority is 'perhaps not

[569] Ibid, 23
[570] Ibid, 16
[571] Ibid
[572] Ibid

proportionate to the actual risk posed to Israel's society by the party's activities."[573] With respect to these considerations, the recent jurisprudence of the Israeli Supreme Court makes a fundamental distinction between the effects of words and actions upon which is predicated an inclusionary as opposed to exclusionary strategy towards the containment of political dissent. This inclusionary approach, it is contended, pays due consideration to the principles of *equality* and *representation* by facilitating continued contestation within the processes of *popular sovereignty*. The protection of the effective right to vote and be elected has trumped periodic attempts by politically motivated members of the Central Elections Committee to legitimise restrictions on the basis of temporal expressions of *popular sovereignty* which are themselves often predicated on a fear of the type of *change* that popular government, if unchecked, may construct.

> "Analysis of the case-law in Israel reveals that the Supreme Court of Israel was willing to define the extremist parties as minority anti-system parties acting within the system, rather than as 'outlaws'…the Supreme Court in Israel will not allow the majority to curtail the political freedom of a political minority which poses no real threat… to the Jewish and democratic state."[574]

4:6: Conclusion: Israel and the Four Principles

When the laws that have emerged from the Knesset regarding party disqualification are contrasted with and evaluated against the Supreme Court's corresponding interpretation of them, it is evident that the Knesset and Court's respective approaches are intrinsically divergent. As Suzie Navot has contended,[575] if an imaginary scale of grounds for disqualification were applied ranging from the simple expression of 'illegitimate' views to actual proof of violent or illegal actions then the approaches exemplified by the Knesset and Court could be placed at or near the opposite ends.

> "In terms of this 'scale', the Basic Law (section 7A) places Israel at the same extreme that permits the 'easy' disqualification of terror-

[573] Navot, Op cit, 756
[574] Ibid, 757
[575] Ibid

> supporting parties. However, Israel's Supreme Court 'moved' Israel from one extreme of the scale to almost the opposite extreme. In doing so it sent a clear message: banning a party from the political process in Israel would only be approved in extreme, exceptional cases in which there is clear and unequivocal proof of a severe violation of the grounds enumerated in the law. Although an explicit law had been adopted by the Knesset to facilitate the disqualification of specific parties; the Court refused to do so."[576]

With regard to the four guiding principles, it is clear that the very existence of electoral exclusion as a mechanism for limiting or containing political dissent represents at some level a violation of all four. Whilst parties which advocate specific changes which have been identified as illegal are allowed to continue to exist and recruit members, they are denied an equal opportunity to contest the processes of popular sovereignty and thus achieve legislative representation for the type of change they aspire to. The Supreme Court by contrast has by establishing a high evidentiary threshold for the justification of electoral exclusion shown itself to be willing to ignore temporal manifestations of popular sovereignty for the purpose of maintaining equal access to the mechanisms underlying the very same principle.

If a common theme does exist between the approach of the main political and judicial bodies with regard to party disqualification, it is in the utilisation of a distinction between words and actions. However, even within this contention there exists a fundamental and substantive difference. Legal exclusion from the electoral arena has been justified by a distinction between words and actions which defines action in prospective terms, by identifying 'illegitimate' goals or policies that a party may wish or be able to bring into effect if electorally successful. By contrast, by defining actions in terms of attributable illegal or violent conduct, the Supreme Court has established judicial barriers to disqualification which have significantly strengthened the right of minority parties to present an electoral challenge to those in power.

[576] Ibid, 758

> "While the Supreme Court has accepted the "Defensive Democracy" theory reflected in Article 7A of the Basic Law in principle, it has consistently set a high evidentiary threshold in cases of disqualification of political parties. This may come as a reaction to the abuse of the disqualification process by the Knesset Elections Committee, which sometimes uses it to settle political accounts. It may also reflect the Court's assessment that despite the legislature's inclination to create more grounds for disqualification, Israeli democracy has reached a level of maturity in which such measures are largely redundant, and perhaps counterproductive."[577]

Israel, therefore, represents a complex case study. While like the transition democracies it has legislated for restrictions based on the protection of substantive or constitutive features of the relevant State, its sparing use of such provisions has been predicated on a procedural judicial approach rather than a number of fluid political factors. Despite the differing reasons for this, both the transition democracies and Israel exhibit a disconnect between their legislative ability to restrict political parties and their actual enforcement of the relevant provisions.

The final two case studies of the United Kingdom and the United States operate within different parameters and as a consequence their overall approach to such matters differs greatly from the type of democracies previously discussed. They represent two long established, stable democratic polities and consequently their need and propensity to legislate for militant restrictions is less than other more fragile democracies. However, like the transition democracies and Israel though less obviously, they have at times both displayed tendencies at odds with their traditional approach. While both have unquestionably operated within a procedural paradigm, there have been and continue to be examples where both polities have sanctioned legal interventions with political rights in pursuit of substantive goals.

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[577] Ido Rosenzweig and Yuval Shany, Israeli Supreme Court Publishes Reasons for Not Disqualifying Parties from 2009 Elections [EA 561/09] [7/3/2011] published on website for Israeli Democracy Institute at http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/27th%20Newsletter/4/4.aspx

CHAPTER 5

United Kingdom: Flexibility in the face of contingency

'Few British lawyers are acquainted with the term 'militant democracy'[578]

5:1 Introduction

The quotation above indicates the absence of a tradition within United Kingdom law which argues for the restriction of political rights with the aim of protecting the long term viability of a system of democratic governance. The lack of such a tradition is reflected in a relative absence of legislative provisions allowing for the restriction of political rights on constitutional grounds. This does not mean, however, that there exist no examples in UK law of the authorities restricting political rights in the name of pursuing legitimate societal goals. Indeed, while the United Kingdom (like the USA) has traditionally followed a primarily procedural approach to such matters; the conventionally unwritten nature of the UK constitution has (in theoretical terms) allowed massive scope for interference with political rights on substantive grounds. One of the tasks of this chapter will be to explain why the relevant authorities have not used the scope available to them to legally intervene in the political arena; thus keeping relevant restrictions both to a relative minimum and to areas not necessarily concomitant with the principles underlying militant democracy.

This chapter will briefly acknowledge examples of such restrictions and the potentially wide template afforded to the authorities in implementing them. This can be explained by a legal context which places no formal limits on parliament's ability to legislate and until very recently contained no formal written protections of relevant rights. It will argue, however, in the case of parties, that the lack of formal protection (based on a view that they are private associations) may have *inter alia* aided the actual procedural protection of such rights in that there has until recently existed no legal recognition of substantive goals upon the pursuit of which, interference with

[578] Richard Mullender 'United Kingdom' in Markus Thiel (ed), *The Militant Democracy Principle in Modern Democracies*, Ashgate, 2009, 311

specific rights may be justified. Correspondingly, it will also argue that the attempt to give further effect to specific rights in the form of the passage of the Human Rights Act may have in some cases had the practical effect of acting in contradiction to one of its main goals of 'giving further effect to rights and freedoms'[579] by providing for the first time explicit legal grounds on which interference with specific rights can be justified.

It will then assess the legitimacy and implications of legislation and associated jurisprudence with reference to at least two of these stated grounds; namely the protection of both public safety and the rights of others. It will proceed to acknowledge that while there now exists the potential for over-invasive interventions on substantive grounds, the tradition of a primarily procedural approach toward such rights suggests that any attempt to locate the United Kingdom's approach within either a purely procedural or substantive paradigm is both inaccurate and simplistic. Finally, this chapter will assess these developments against the template of the four guiding principles and assess whether the balance achieved between them facilitates the continuing availability of disagreement necessary for a vibrant, flourishing democracy.

5:2: Constitutional Context

In 1843,[580] Karl Marx made a distinction between the idea of human rights which were related to the protection of individual autonomy from collective action and civil liberties which were 'partly political rights, which are only exercised in community with others'[581] whose purpose was to facilitate '…participation in the community, in the political community or state.'[582] Implicit within Marx's observations was a belief that not only was there a distinction in purpose between these types of rights but that such purposes existed in inherent opposition to each other.

> "There is also a suggestion that the two are contradictory rather than complementary, serving what may sometimes be conflicting goals:

[579] Human Rights Act 1998 c42
[580] K. Marx 'On the Jewish question' 1843 reproduced in K Marx, *Early Writings*, (Penguin Classics)1975
[581] Ibid, 227
[582] Ibid

> one is designed to fuel the engine of democracy, and the other to act as its brake."[583]

This tension between the power of the collective polity and the rights of the individual is one that lies at the heart of most modern constitutions. What has made the United Kingdom unusual is the lack of a single codified document detailing the respective powers of government and the rights afforded to its individual citizens. In essence, the Constitution of the United Kingdom can be described as

> "…a body of rules, conventions and practices which describe, regulate, or qualify the organisation, powers and operation of government and relations between persons and public authorities."[584]

The United Kingdom has also adhered to the doctrine of parliamentary sovereignty. Two of the major tenets of this doctrine are that, firstly, there are no effective restrictions on the legislative power of parliament and secondly, no parliament can pass legislation that effectively binds its successors. Such a situation has inevitably left the rights of individuals vulnerable to legislative action. The fact also that within the parliamentary system, executive power is premised on the ability to secure majority support for legislation has meant that traditionally, the United Kingdom has been perceived as

> "…not a country where everything done by government is prohibited unless expressly permitted; rather [it] is a country where everything done by government is permitted unless formally prohibited."[585]

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[583] K.D. Ewing and C.A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 19194-45,* Oxford University Press, 2000, 5
[584] C. Turpin and A. Tomkins, *British Government and the Constitution,* Cambridge University Press, 2007, 4
[585] K.D. Ewing , *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law,* Oxford University Press, 2010, 3

This untrammelled legislative and executive power was reconciled with individual liberties in the writing of A.V. Dicey.[586] Dicey argued that individual liberties were protected due to the conception of the rule of law under the system of Common Law. He contended that such protections developed as a result of firstly, an acknowledgement of the principle of equality before the law allied to an observation that the system of Common Law evolved as a result of independent judicial decisions concerning the liberties of the individual. Dicey viewed the Common Law as a bulwark of liberal individualism against the potential misuse of legislative power residing in Parliament. It was to be the brake on democracy envisaged by Marx.

In the early years of the twentieth Century, two cases showed that the Common Law could indeed be utilised to deny the extension of civil and political rights. In *Nairn v St Andrews University*[587], it was declared that it was '…a principle of the unwritten constitutional law of this country that men only were entitled to take part in the election of representatives to parliament.'[588] In *Osborne*[589], the House of Lords struck down the imposition of a levy on Union members which purpose was 'to promote parliamentary representation generally and the Labour Party in particular…'[590] arguing that working class representation in parliament was only acceptable 'provided that they adapted to the values of the existing constitution in which the role of parliament was to advise and deliberate in the 'national interest', rather than to act in a concerted and predetermined way to promote the sectional interests of a particular class.'[591]

Unsurprisingly therefore, it has been Parliament itself which has created the basic rights of political participation. Examples include the first major extension of the franchise in 1832,[592] the adoption of the secret ballot in 1872[593] and the establishment of women's equal right to vote in 1928.[594] In enacting such legislation, Parliament and

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[586] A V Dicey, Introduction to the Study of the Law of the Constitution, (10th Edition by ECS Wade, 1959) referenced in Ewing and Gearty, Op cit, 7
[587] [1909] AC 147,
[588] Ibid, 163
[589] *Amalgamated Society of Railway Servants v Osborne*,[1910] AC 87
[590] Ewing and Gearty Op cit, 19
[591] Ibid, 21
[592] *Representation of the People Act* (1832) 2&3 Will IV
[593] *Ballot Act* 1872 35&36 Vict.c.33
[594] *Representation of the People Act* 1928 18&19. Geo.5.c.12

more specifically the House of Commons enhanced the underlying principles of democratic governance by both equalizing the conditions under which the processes of popular sovereignty operate and strengthening the popular legitimacy of those subsequently elected to represent the citizenry. Such measures also offered an increased prospect of economic and social change as those elected to implement legislation now had to take account of a wider array of economic and social interests. In widening the basis for political participation, parliament can be characterised as having provided the fuel for the engine of democracy. However, the dominant norm of parliamentary sovereignty contained the seeds of an underlying paradox.[595] While parliament had fashioned and extended the tools of political participation, it retained the ability to both dilute and restrain their effective use. The effectively untrammelled right of parliament to change legislation meant that the procedural equality established through the processes of popular sovereignty remained vulnerable to restriction and contraction in pursuit of particular substantive ends. The dominance of parliament was potentially a brake on as well as a fuel for democracy.

> " We are thus immediately faced with the dilemma of democracy which is that only a sovereign parliament can satisfy the requirement that the political and legal sovereign be representative and accountable, but in a representative and accountable democracy only a sovereign parliament can impose controls on the exercise of that sovereign power."[596]

The United Kingdom parliament has passed numerous measures either restricting or suspending certain rights of all or some of its citizens. As we shall see, these legal interventions have tended to be piecemeal in nature. When the activities of certain political actors have been deemed to be threatening, the inclination has been 'to respond to the activities of a particular group in ways that speak concretely to the threat it appears to pose.'[597]Consequently, such interventions are often justified not in reference to philosophical theory but in light of the specific circumstances that exist.

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[595] Ewing and Gearty, Op cit 23
[596] Ibid, 23
[597] Mullender Op cit,312

This approach has been convincingly described as 'flexibility in the face of contingency'[598]

5:2:1Examples of Restrictions

In the early years of the twentieth century, the United Kingdom Parliament passed legislation which heavily restricted the civil (if not explicitly political) rights of many citizens. For example, in relation to the struggle of Irish Nationalists to overthrow British rule, laws were passed which *inter alia* allowed for conferral of exceptional powers to the executive including the ability to impose martial law[599]as well as the application of internment,[600],a power utilised by the Stormont Government of Northern Ireland almost fifty years later. While these measures can be viewed in context as being 'militant' in pursuit of substantive goals such as protecting both the territorial integrity of the State and the physical security of the citizenry, it is difficult to place them within the paradigm of 'militant democracy'.[601]

> "These responses to Irish Nationalism…provide rather problematic examples of militant democracy. For they have to do with the preservation of a legal order that was the fruit of an imperialist project that began in pre-democratic times."[602]

Further evidence that the UK approach to Irish Nationalism cannot be simply placed within a 'militant' classification is the general freedom and tolerance afforded to political parties closely linked to violent as well as non-violent activities. As the acknowledged political wing of the IRA, Sinn Fein has both praised and justified the commission of violent acts in pursuit of its goal of a united Ireland. Despite this and with some infamous exceptions,[603] British governments have generally allowed Sinn Fein the freedom to both argue its case and to contest elections within Northern

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[598] Ibid, 313
[599] *Restoration of Order in Ireland Act* 1920 10&11 Geo.5.c.31
[600] *Civil Authorities(Special Powers) Act* 1922 12&13 Geo.5 c.5
[601] Mullender, Op cit, 315
[602] Ibid, 318
[603] See *Brind v United Kingdom* (1994) 18 EHRR CD 76- This case which was ruled inadmissible by the European Commission on Human Rights involved the UK governments attempt to symbolise its moral opprobrium towards those who would justify violent acts by banning the main broadcasters from directly broadcasting the words of representatives from groups such as Sinn Fein. The words used were allowed to be broadcast by actors. While successful in a strictly legal sense, the UK government was subject to public and political ridicule.

Ireland. A partial explanation for such leniency was the recognition by the United Kingdom authorities that as a popular political party, Sinn Fein helps both articulate and aggregates the preferences of a large section of the nationalist population. Consequently, if a political solution to the conflict was to be achieved then such views had to be afforded both tolerance and the opportunity to seek electoral representation.

> "A sustainable peace was only achieved in Northern Ireland when the British government accepted that the cause of the violence was political and that a solution must also be political."[604]

By continuing to afford these rights, the UK government also allowed (whether intentionally or otherwise) for the beginning of a genuine shift in strategy within the republican movement towards more peaceful methods. For example, even at the height of the conflict exemplified by the 1981 hunger strikes, the continuing ability of Sinn Fein to contest elections helped plant the seeds of a greater commitment to democratic methods which would come to fruition in the form of a successful peace process years later.

> "The IRA's political wing, Sinn Fein, ran Bobby Sands in a by-election for a seat at Westminster and he won handsomely. When he died a month later it was as an elected member of the British parliament. This political success also had the long term and quite unanticipated consequence of demonstrating to the membership of the IRA the advantages of political over military action and provided a spur to the pragmatists within the movement who sought to develop a political strategy."[605]

In allowing Sinn Fein to continue to function as a legitimate political entity, successive governments have displayed a laudable flexibility. This flexibility at least allowed for the perception that the views of the entire nationalist community were being afforded equal respect and consequently facilitated the development of political

[604] Phil Rees, *Dining with Terrorists,* Macmillan, (2005), 198
[605] Louise Richardson, *What Terrorists want*, John Murray, (2006), 14

space which allowed Sinn Fein to gradually move procedurally to an endorsement of democratic methods as a means of political engagement and thus towards a substantive negotiated settlement.

By contrast, it is more plausible to argue that the legislative restrictions aimed at members of the British Union of Fascists in the late 1930's (including the criminalisation of paramilitary displays[606] as well as the introduction of detention without trial[607]) were more concerned with protecting the democratic character of the State given that the organisations concerned were avowedly totalitarian in ideological terms and as a result politically sympathetic to a foreign regime against whom, war was becoming increasingly inevitable.

Whatever the specific motivations behind these restrictive measures, one consistent feature of them is that they were primarily aimed at individual members of the offending political groups or parties and not the organizations themselves. These groups were allowed the continuing freedom to argue their case and contend for elected office on an equal basis to others. The next section of this chapter will provide at least a partial explanation of the relative free reign given to political groups and parties by arguing that the legal status historically afforded to political parties grossly underrepresented their actual influence on the legislative process. As a consequence, it is also contended that the actual influence of individual members of parliament has been negligible in comparison to the relevant legal and constitutional orthodoxy.

5:2:2 Parties, MPs and the Constitution

The fact that the United Kingdom's constitution is not codified has meant that political parties are given little if any formal constitutional recognition. This lack of recognition has been such that Jean Blondel was able to write in 1963 that political parties were 'private associations to which the law does not give more rights or duties than to other private organizations.'[608] Any legislative recognition of the role of parties has occurred in a piecemeal and incoherent manner. Examples include the

606 *Public Order Act* 1936- 1 Edw. 8 & 1 Geo. 6 c. 6
607 Defence Regulation 18B- Emergency Powers (Defence Act) 1939- 2 & 3 Geo. 6 c. 62
608 Jean Blondel , *Voters, Parties and Leaders: The Social Fabric of British Politics*, Penguin, 1963, 87

recognition of the post of Leader of the Opposition[609], allowing the placing of party affiliation on ballot papers[610] and most recently the establishment of a registration system for elections requiring parties to *inter alia* provide information on their main office holders, a copy of their constitution as well as evidence of financial probity alongside the imposition of limits on fundraising and spending.[611] While the provision of a copy of a party's constitution is a necessary element of registration, there are no formal requirements as to what these must contain and there therefore exists no 'legal incentive, or indeed compulsion' for political parties to organise their internal affairs 'according to democratic principles.'[612]As such, the view of political parties as private entities beyond the scope of legal regulation continues to represent a 'dominant paradigm.'[613]

> "…the motivation for the statutory recognition of political parties in the United Kingdom has…largely been driven as a driven as a by-product of the debate on political finance and how best to regulate it, and to enable party lists in the European elections, rather than as a measure to rectify their arguably anomalous status as voluntary associations.'[614]

A substantial contributory factor to the lack of formal recognition for parties is the continuing attachment within the constitution to the Burkean[615] notion that Members of Parliament are independent representatives working for the national interest. This notion has received judicial backing in numerous cases which have established the principle that an MP is a trustee rather than a delegate and cannot be mandated to vote in a particular way[616], be it through adherence to party policy[617] or the wishes of his or her constituents.[618]

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[609] *Ministers of the Crown Act* 1937 c.38
[610] *Representation of the People Act* 1969 c.15
[611] *Political Parties, Elections and Referendum Act* 2000 c.41
[612] Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy,* Ashgate, 2010, 91
[613] Ibid, 62
[614] Ibid, 68
[615] Edmund Burke 'Speech to the Electors at Bristol at the conclusion of the poll' reproduced in *The Works of the Right honourable Edmund Burke Volume 1,* Henry G. Bohm, 1854, 446-48
[616] *Amalgamated Society of Railway Servants v Osborne* [1909] 1 Ch. 163
[617] *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768
[618] *R v Waltham Forest London Borough Council; ex parte Baxter* [1988]

> "It would appear…that a voter cannot hold their elected representatives accountable for voting along party lines in breach of their duty to their constituency. Similarly, neither a political party nor its members nor supporters can hold its parliamentarians legally accountable for failing to abide by party policies or election promises."[619]

However, this traditional and judicially endorsed view of the MP as a trustee is one is that is at odds with political reality. The existence of effective 'party' government within the United Kingdom with the relative dominance of two parties alongside an organized whip system has done much to negate the independence of individual parliamentarians, 'the overwhelming majority' of whom 'are elected not as individuals, but on the basis of party endorsement.'[620] In opposition to political actuality, the dominant legal contention 'that parliamentarians are (and should be) independent of party influences has presented a key barrier to the constitutionalisation of political parties.'[621]

It is therefore evident that there exists a massive disparity between the actual influence of political parties within the system and the constitutional protection afforded to them. However, the actual consequences of a lack of constitutional recognition display a similar incongruence. Firstly, the absence of formal constitutional recognition would suggest a corresponding lack of protection for the right to associate for political ends. Further, the existence of a parliament dominated by large competitor parties with the ability to legislate in any way it seems fit, potentially places those parties who wish to challenge the status quo in a legally precarious position. Despite this seeming vulnerability, parties in the United Kingdom have traditionally remained free from regulation and interference. There are a number of reasons for this.

Firstly, as indicated earlier, the dearth of constitutional recognition has led to parties being perceived as primarily private associations and thus being subject to little or no

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[619] Gauja, Op cit, 198
[620] Ibid, 36
[621] Ibid, 36-37

public regulation. Next, as has been evident throughout the previous four substantive chapters,[622] countries which offer constitutional protection for political parties often place content or ideologically based conditions on such protection. These conditions vary between jurisdictions but often include a commitment to democratic governance, the use of peaceful methods and respect for the territorial integrity of the State in question. The imposition of such conditions on protection thus establish legal bases upon which the protection of the constitution may be removed. Partly because of the doctrine of parliamentary sovereignty and the corresponding potential for unlimited change, there are no formal substantive outcomes that the British Constitution either officially endorses or forbids. Parties in the United Kingdom have subsequently not been subject to content based or ideological conditions and as such those advocating and organizing around what may be described as extreme positions have been afforded the same tolerance as more mainstream manifestations. Finally, there exists in the political culture, a recognition of the value of both individual and collective dissent within a democracy.

> "In a democratic society, it is essential that those in authority face criticism and opposition and traditional views are challenged, and that individuals are given the opportunity to form certain ideas in common with others. Given the inability of most people to have access to the media in order to disseminate their views, the rights of association and assembly provide the perfect opportunity to take part in the democratic debate by imparting one's views and by challenging the actions and views of others."[623]

In 1998, the United Kingdom passed legislation in the form of the Human Rights Act which for the first time afforded a degree of explicit recognition and protection for political rights. The following section will discuss its general constitutional effect and assess its potential impact on those rights which fuel the engine of democracy. It will be argued that a similar contradictory impulse is evident. Just as the lack of formal constitutional recognition helped give parties a greater degree of freedom then the

[622] These have included include discussion of Post war Germany and Post Communist Polities as well as countries such as Turkey, Israel and Spain
[623] Steve Foster, *Human Rights and Civil Liberties*,2nd Edition, Pearson Education, 2008, 487

attempt to extend formal constitutional protection for individuals and groups may place limitations on their ability to fully engage in the democratic process by establishing substantive outcomes or legitimate interests upon whose pursuit, interference with their political rights may be justified.

5:3 The Human Rights Act

The Human Rights Act [624] was passed in 1998 and came into effect in 2000. The purpose of the legislation is to give effect to the rights contained within the European Convention of Human Rights[625]within domestic law. It does so in a variety of ways. Firstly, it obliges Courts unless prevented by primary legislation to decide all cases compatibly with Convention rights.[626] It also requires them to interpret and give effect to legislation in a way that is in conformity with the Convention.[627] It then proceeds to mandate domestic courts to take relevant case law from Strasbourg into account.[628] This development has potentially massive implications. As was evident in the opening two substantive chapters, the European Court of Human Rights has on occasion used the assumptions underlying the theory of militant democracy to uphold massive legal interventions in democratic polities. While similar interventions have yet to be attempted within the United Kingdom's political arena, there now exists both the legal mechanism and precedent to do so. If a Superior Court cannot interpret legislation in a way that is compatible with the Convention, it is empowered to issue a Declaration of Incompatibility.[629] This mechanism is intended to place a degree of pressure on the relevant government minister who then has the option of amending the law either through primary legislation or remedial order.[630] However, the government is under no legal requirement to amend the law in such circumstances and consequently, the doctrine of parliamentary sovereignty is respected.

Despite the maintenance of parliamentary sovereignty, the passage of the Human Rights Act represents a substantial shift in constitutional law. The United Kingdom for the first time has a written statement detailing the rights of individuals. While the

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[624] Human Rights Act, 1998 c.42
[625] *Convention for the Protection of Human Rights and Fundamental Freedoms in Europe* 1950
[626] Human Rights Act, Op cit, s6(1) and (2)
[627] Ibid, 3(1)
[628] Ibid 2(1(a))
[629] Ibid, 4(2)
[630] Ibid 10

UK has long been a signatory to the ECHR, the Act still represents a major modification of existing practice.

> "The Human Rights Act makes the Convention far more central to the practice of law in Britain. Until it came into force, there was no overriding presumption that Parliament intended in the past and in the future to legislate so as to conform with the rights protected by the Convention."[631]

However, with specific reference to those political rights intended to fuel the engine of democracy, it is not necessarily clear that their formal recognition under the Human Rights Act makes their protection any more secure than had been the case previously. The Act gives domestic effect to the rights of freedom of expression and association under Articles 10 and 11 of the Convention respectively. These rights are however qualified and can be restricted as long as such restrictions are 'prescribed by law' and 'necessary in a democratic society' in pursuit of a legitimate interest.[632] While the legitimate interests listed under Articles 10 and 11 are not identical, they both include *inter alia* public goods in the form of national security, public safety and protection of the rights of others. It can be argued that the Human Rights Act while formally extending the protection afforded to the political rights of expression and association has opened the door to their eventual contraction by making legally explicit the bases under which they may be restricted. In other words, by attempting to constitutionally recognise those rights which fuel democracy, the HRA has stated explicitly the substantive grounds upon which a brake on such rights may be applied.

With respect to the principles of democracy, incongruent as it may seem, the lack (until recently) of a written commitment to procedural equality helped maintain effective procedural equality. Firstly, by adhering to a trustee model of representation, Constitutional law has grossly underestimated the actual influence of parties as the main collective organs of both popular sovereignty and representation and as such left them relatively free of regulation. Secondly, the principle of changeability

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[631] John Wadham et al, *Blackstone's Guide to the Human Rights Act, 1998*, 4th edition, Oxford University Press, 2007, 10

[632] ECHR, Op cit, Articles 10 (2) and 11(2)

exemplified in the doctrine of parliamentary sovereignty has meant that even parties espousing extreme positions or policies are afforded the right to contest the processes of popular sovereignty in order to seek and achieve representation for their views. Ironically, the introduction of a formal commitment to such rights through the Human Rights Act may potentially allow for the future dilution of procedural equality by bringing into domestic law a list of substantive outcomes upon the pursuit of which such dilution may be legally justified. The remaining sections of this chapter will examine and evaluate the implications of attempts to subvert procedural equality in pursuit of some of the substantive goals listed within Articles 10 and 11. Later, attention will be given to legal attempts to limit dubious expression in the form of hate speech which potentially threatens the rights of others. Next, however, this chapter will assess both the efficacy and legitimacy of the UK government's proscription of political groups on the grounds that they are linked to terrorism and consequently pose a threat to both national security and public safety.

5:4 The Proscription of Terrorist Groups

The Terrorism Act of 2000[633]allows for the proscription of groups which the Home Secretary believes are 'concerned in terrorism.'[634] The groups proscribed are listed in Schedule 2 of the Act. The addition of a group to the list requires parliamentary approval.[635]For the purposes of the Act, 'concerned in terrorism' is defined as 'commits or participates in acts of terrorism',[636] 'prepares for terrorism'[637] or 'promotes or encourages terrorism.'[638] The Terrorism Act of 2006 added an offence of glorification of Terrorism as a reason for proscription under the aegis of 'promotes or encourages'.[639]Again for the purposes of the Act, Terrorism is defined as 'the use or threat of action'[640] which is designed to 'influence the government or an international governmental organisation or to intimidate the public or a section of the public'[641]for

[633] Terrorism Act, 2000 c.11-This legislation allowed for the proscription of groups concerned in International terrorism. Previous legislation had limited propscription to 14 groups associated with the conflict in Northern Ireland
[634] Ibid, s3(4)
[635] Ibid, s123
[636] Ibid, s3(5(a))
[637] Ibid s3(5(b))
[638] Ibid, s3(5(c))
[639] Amended version of Ibid, s3(5) ss(5A-5c)
[640] Ibid s1(1)
[641] Ibid s1(1(b))

the purposes of 'advancing a political, religious or ideological cause.'[642] Action in this context is also defined *inter alia* as acts which involve 'serious violence against a person'[643], 'endanger a person's life'[644] and 'creates a serious risk to the health or safety of the public, or section of the public…'[645]A person subsequently found to be a member of any organisation proscribed under the Act is themselves deemed to be guilty of an offence.[646]As of February 2012, 52 organisations were proscribed under the Act including two which were added under the ban on glorification added in 2006.[647]It is worthy of note that while the original list of groups was dominated by those involved in the conflict in Northern Ireland, the current list betrays a preoccupation with Islamic fundamentalism which is evidently a response to the events of the early years of the 21st Century.[648]

The passing of the Terrorism Act of 2006 did not occur in a political vacuum. It was a direct response to the events of July 7 2005. That the offence of glorification was partly motivated by these events was given credence by the words of the Home Secretary in Parliament in October of that year.

> "the July events indicate that there are people in this country who are susceptible to the preaching … of an argument or a message that terrorism is a worthy thing, a thing to be admired, a thing to be celebrated and then act on the basis of that…. What this Bill is about is trying to make that more difficult, that transition from people encouraging, glorifying to then an act being undertaken."[649]

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[642] Ibid s1(1(c))
[643] Ibid s1(2(a))
[644] Ibid s1(2(c))
[645] Ibid s1 (2(d))
[646] Ibid s11
[647] Names of groups available at http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/proscribed-groups?view=Binary

[648] The original legislation and the subsequent addition of proscribed groups were motivated and given authority by UN security council resolutions intended to strengthen the international fight against terrorism both pre and post 9/11- most notably Resolution 1269 in 1999 and 1373 in 2001
[649] *Hansard Commons Draft Terrorism Bill, Written and Oral Evidence*, HC 515-I, October 11, 2005, Q.3 quoted from Hunt Op. cit 441

The emergence of global terrorism as a defining international issue has led to a shift in attitudes towards the balance to be struck between individual liberties and public safety. Tony Blair famously asserted in August 2005 that 'the rules of the game have changed.'[650] In this context, it has been argued that the 2006 Act is an understandable response to 'the emergence of religious and ideological divisions of unprecedented persistence and depth and by the recent perpetration of unimaginable acts of terrorist violence.'[651] It is clearly a legitimate substantive goal of democratic governments to protect their citizenry from political violence. It is therefore difficult to argue against the contraction of procedural equality for those who show scant or no regard for equal respect through their willingness to inflict violence and even death in the pursuit of their own substantive ends. Proscription in this regard can be viewed as a declaration of intent.

> "much of the purpose of proscription is symbolic—to express society's revulsion at violence as a political strategy as well as its determination to stop it."[652]

With specific regard to those groups proscribed under the Terrorism Act, Clive Walker has stated

> "There is little doubt that the vast majority… listed organizations have in fact engaged in terrorism and are still capable of doing so…Many of the same groups are banned by other countries, and some appear in terrorism finance lists issued by either the United Nations or the European Union."[653]

However, while it may be true that the intent behind proscription is laudable in symbolic terms and that almost all the groups so far proscribed have been 'concerned in terrorism', this does not necessarily imply that the introduction of the power of proscription is immune from substantive criticism. Indeed, it is contended that the

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[650] Quoted in Guardian Leader Article 'Liberty is our Defence' August 23rd 2005, at www.guardian.co.uk/Politics/2005/aug/23/immigrationpolicy.terrorism
[651] Barnum, Op cit, 277
[652] Clive Walker, 'Militant Speech about Terrorism in a smart Militant Democracy' in *Mississippi Law Journal,* Vol 80 (4), 2011, 1409
[653] Ibid 1410-11

Acts of 2000 and 2006 both contain provisions that are worrisome from a democratic perspective. It will be argued that the introduction of 'glorification' as a legislative ground for proscription potentially allows for the removal of legitimate vehicles of representation in a way that may be counter-productive to the aim of proscription. Firstly, however, it is maintained that the original power to proscribe is not subject to either successful parliamentary scrutiny or effective judicial oversight.

5:4:1: Proscription and De-proscription

With regard to an original decision to proscribe, it is evident that there exists a glaring lack of effective parliamentary scrutiny. While it is true that a proscription order requires the approval of parliament, the order itself can only be accepted or rejected: there being no mechanism for amendment. The absence of such a mechanism is a feature of delegated rule making in the UK and may be of little consequence when only one organisation is subject to a proscription order; However, it is of more concern when several organisations are being proscribed at the same time as happened with the original ministerial order in 2001[654] and with several since.[655] In such a scenario, members of parliament who may have legitimate concerns about the validity of a proscription order against a specific organization have to take into account the potential political consequences that a vote against proscription for one group will also represent a vote against proscription for all the groups named in the same order.

> '…if you wanted to proscribe al-Qaeda, you had to proscribe [other organisations] as well. If you wanted to keep [a particular organisation] off the list, you were accused of not wanting to proscribe al- Qaeda."[656]

There are also major concerns[657] about the adequacy of procedures relating to the judicial review of a minister's decision to proscribe. Not only is the original decision to proscribe taken without the organization being given an opportunity 'to contest the

[654] SI 2001 No 1261
[655] SI 2002 No 2724; SI 2005 No 2892; SI 2006 No 2016 and SI 2007 NO 2184
[656] Anonymous solicitor quoted at http://iranjustice.org/content/view/32/28/. Referenced in Ewing, Op cit, 185 fn 22
[657] Ewing Op cit, 185-7

reasons for the… proposed proscription'[658] a subsequent High Court decision[659] states that relevant orders are not subject to normal channels of judicial review and are only challengeable under the de-proscription procedure provided for in the 2000 Act.[660]

The de-proscription procedure[661] involves the making of an application against the decision to proscribe to the Home Office; the same department which has just sought and secured approval for the order which is subject to challenge

> "…In view of the fact that he has just proscribed the applicant association, and in view of the fact that he has just secured parliamentary approval, the chances of any such application succeeding are very slim."[662]

If, as is likely, the original request for de-proscription is unsuccessful, then the relevant organization has leave to appeal to an independent Proscribed Organisations Appeal Commission (POAC).[663] It must be stressed, however, that what is being appealed is not the original decision to proscribe but the subsequent decision by the Home Office not to de-proscribe.[664] The consequent gap in time between the original decision to proscribe and a decision to challenge the decision not to de-proscribe has potentially deleterious consequences for those inclined to continue a legal challenge. As Kenneth Ewing has noted.

> "But by the time it has applied to be de-proscribed, the organisation is illegal, and anyone bringing a case on its behalf to the POAC will reveal himself or herself as a member or supporter and run the risk of prosecution under section 11 of the Act, the procedure in this sense in danger of being a honey trap."[665]

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[658] Ibid, 185
[659] *R (Kurdistan Workers Party) v Home Secretary* [2002] EWHC 644 (admin)
[660] Terrorism Act 2000, S 4-6
[661] Ibid, s4
[662] Ewing, Op cit
[663] Ibid s5(1) and (2)
[664] Ibid s5(3)
[665] Ewing, Op cit, 186

Unsurprisingly, given the procedural barriers facing them, very few proscribed groups have challenged their banning orders with only one to this point having been successful.[666] In this particular hearing, the POAC overturned a decision by the Home Office not to de-proscribe the organization known as PMOI[667] labelling such a refusal 'perverse'[668] in the context of overwhelming evidence that the organization in question were now committed to the establishment of democracy in Iran and had surrendered any weapons previously held. An attempt by the Home Office to appeal the Commission's decision to de-proscribe was subsequently denied by the Appeal Court[669] on the grounds that the relevant minister had given too wide an interpretation to 'concerned in terrorism' as a legislative ground for proscription.

> "We agree with POAC that an organisation that has no capacity to carry on terrorist activities and is taking no steps to acquire such capacity or otherwise to promote or encourage terrorist activities cannot be said to be 'concerned in terrorism'…An organisation that has temporarily ceased from terrorist activities for tactical reasons is to be contrasted with an organisation that has decided to attempt to achieve its aims by other than violent means. The latter cannot be said to be "concerned in terrorism" even if the possibility exists that it might decide to revert to terrorism in the future."[670]

In welcoming the decision by the POAC, Adam Tomkins has argued that it can be viewed as an example of a developing trend.

> "If national security has to come to court, it follows not that the courts have to give way to claims made in the name of national security, but that claims made in the name of national security have to give way if they cannot satisfy the court. Where the evidence supports the Government's decision, so be it. But where it does not,

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[666] *Lord Alton of Liverpool v Home Secretary*, PC/02/06
[667] People's Mojihadeen Organization of Iran
[668] *Lord Alton,* Op cit at 349
[669] *Lord Alton of Liverpool and others v Secretary of State for the Home Department* [2008] EWCAC iv 443
[670] Ibid at 37 and 38

> it is the constitutional duty of the court to say so and to rule accordingly."[671]

Effectively, Tomkins is arguing that attempts to dilute procedural equality in the pursuit of the substantive interest of protecting national security will in the main only be endorsed if there is sufficient evidence to do so. While such a trend is welcome, it is evident that the Terrorism Act places substantial procedural barriers in the way of effective legislative scrutiny of and judicial challenge to what may be invalid decisions to proscribe. Further evidence of this comes from the fact that even the successful application for de-proscription made in the PMOI case came from a collection of MPs and peers[672] rather than members of the organization itself who had withdrew from the process in exasperation.[673] By making it extremely difficult for relevant groups to challenge potentially erroneous proscription orders, the Terrorism Act runs the risk of reinforcing the sense of political impotence that may have made the use of violence as a political strategy attractive in the first place. This potential drawback is exacerbated further when it is also acknowledged that the latest legislative ground for proscription can if utilised carelessly potentially allow for the proscription of organizations which are amenable to using peaceful and democratic rather than violent means to achieving their political ends.

5:4:2 Glorification as a ground for proscription

In the febrile atmosphere present in the immediate aftermath of the 7/7 attacks and in response to Article 5 of the Convention on the prevention of terrorism's demand that countries introduce domestic offences outlawing the 'public provocation' of terrorist offences,[674]sections 21 and 22 of the Terrorism Act of 2006 amended the Act of 2000. The 2000 Act now allows for criminal prosecution of individuals[675] and the proscription of political groups on the grounds that the relevant individual or group engage in 'the unlawful glorification of the commission or preparation…of acts of

[671] Adam Tomkins 'National Security and the role of the court: a changed landscape' in *Law Quarterly Review* Volume 126 (Aut), 2010, 567
[672] Terrorism Act, 2000 s4(2(b)) which allows for applications by 'any person affected by the organisation's proscription
[673] Ewing, Op cit, 187
[674] Council of Europe Convention on the Prevention of Terrorism (2005)
[675] Terrorism Act 2000 as amended by Terrorism Act 2006 s1(1)

terrorism'[676]where glorification is defined as 'any form of praise or celebration'[677] and is unlawful if persons aware of it could be expected to infer that the actions being glorified are being glorified as conduct 'that should be emulated in existing circumstances'[678] or 'that is illustrative of a type of conduct that should be emulated.'[679]As of July 2012, two groups have been proscribed on these grounds.[680]

While as previously argued, it may be perfectly acceptable to dilute procedural equality on the grounds of national security for those groups which have used violence or incited the commitment of specific violent acts, it is less clear from a democratic perspective that mere praise of previous acts or allusion to possible future strategy represent grounds for massive intervention with the right to freedom of association. In extending 'the basis for militant responses from deeds to words',[681] the 2006 Act has potentially troubling implications for the pursuit of the substantive goal of public safety that it professes to pursue. In this regard, the example of Sinn Fein is instructive. As has been previously discussed, successive UK governments have displayed a laudable flexibility in allowing groups such as Sinn Fein the political space to both represent the wishes of a large percentage of nationalist opinion and to effect change within the relevant body of opinion towards a negotiated settlement. The concern with glorification as a ground for proscription is that it potentially allows for the future proscription of political parties like Sinn Fein who have praised or justified the use of violence in the past or alluded to its possible use in the future.

It is contended that any such future ban on a relevant party would represent a retrograde step. Firstly, it would risk reinforcing or indeed exacerbating any existing sense of injustice and would therefore likely become a potential rallying or recruiting point for those determined to follow a violent path. Secondly, it would also likely make an eventual solution to the problem more problematic as 'the ability to negotiate with terrorists becomes more difficult if the authorized face of the group is banished

[676] Ibid s 1(3(a)) and s3(5(5A(a))) respectively
[677] Ibid 3(5(5C))
[678] Ibid s 1(3(b)) and s 3(5(5B(a))) respectively
[679] Ibid 3(5(5B(b)))
[680] Names of groups available at http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/proscribed-groups?view=Binary
[681] Walker, Op cit,1411

from sight.'[682] In its approach to the political rights of Sinn Fein, the United Kingdom showed a flexibility that was central to the achievement of a political resolution. Unease surrounding the provisions of the Terrorism Acts of 2000 and 2006 is related to the fact that they seem to indicate a more inflexible approach to those who even allude to violence as a past or future political tactic. It is important that in the desire to symbolically display a polity's abhorrence with political violence, that same polity does not allow for the relatively easy removal of a vehicle for legitimate grievance which may also be central to a peaceful resolution of any conflict inspired by such grievance.

5:5 Racial and Religious Hatred

One of the unfortunate consequences of the emergence of Islamic terrorism has been a corresponding growth in offences against person and property which are motivated by racial or religious hatred.[683] Some of these offences have taken the form of political expression by individuals or collective entities. The final substantive section of this chapter will examine the steps or in some cases the lack of steps the relevant authorities have taken to either punish or ameliorate the effects of expression based on hatred. It will argue that while the approach displays a similar flexibility with regard to freedom of association to that employed toward Sinn Fein, when taken in conjunction with the terrorism legislation, there is evidence of a deployment of a more philosophical approach which may have repercussions for the future existence of substantive disagreement. In respect to the expression of religious or racial intolerance, the most high profile recent example of a collective entity indulging in such behaviour has been the British National Party (BNP).

Founded in 1982, the party has openly railed against the idea of a multi-cultural society and has condemned what it perceives as the growing 'Islamification' of the

[682] Leslie Turano 'Spain: banning political parties as a response to Basque Terrorism' in *International Journal of Constitutional Law,* Volume 1(4), 2003, 739
[683] Professor Nigel Copsey 'Anti-Muslim Hate Crime and the Far Right' *Report at Teeside University,*June 2013

United Kingdom.[684] In 2010, it was forced to amend its constitution and allow non-indigenous members after a legal challenge.[685]

Despite widespread public revulsion toward the party and its policies, the UK authorities have done little or nothing to interfere with its right to organise and offer candidates for elected office. There are a number of possible factors that have contributed to such inaction by the authorities. Firstly, as has been previously indicated, there has been tendency to treat political parties as private associations rather than public entities and as a consequence there has been a corresponding lack of regulation. Next, the traditional lack of a written constitution alongside the existence of parliamentary sovereignty has meant that the substantive goals of racial and religious equality have until very recently not been formally acknowledged constitutionally and as such there has no requirement on parties to acknowledge the legitimacy of these substantive ends. However, again as previously acknowledged, the Human Rights Act has legally acknowledged the right of authorities to interfere with freedom of association in the pursuit of the legitimate aim of *inter alia* 'protection of the rights of others.' [686] Therefore, the refusal of the authorities to act against the BNP in the contemporary legal context is, it is contended, more attributable to substantively political rather than legal factors. One may be the recognition that support for the BNP is not monolithic and consequently not necessarily motivated by racial or religious hatred but by genuine concerns over issues such as the economic and social impact of immigration. These concerns deserve as much recognition and representation as any others and their expression through joining and/or voting for the BNP is consequently legally tolerated. More substantively, however, there also exists a fundamental belief in the importance of political parties to the democratic process. Any interference with their ability to operate is thus deemed more invasive and subsequently less legitimate than restricting an individual's right to expression.

> "In most circumstances, however, the law will tolerate unpopular and anti-democratic bodies, provided they do not commit a breach

[684] *Democracy ,Freedom, Culture and Identity* (2010), British National Party Manifesto for General Election p30-34
[685] *The Commission for Equality & Human Rights v Nicholas John Griffin, Tanya Jane Lumby, Simon Darby***, (**2010) WL 5139402
[686] ECHR, Op cit, Art 11(2)

> of the law, or breach of specific provisions intended to protect others from the worst excesses of those beliefs. Thus, although groups such as the BNP are not proscribed, their members are more vulnerable than others to prosecution for specific criminal law offences designed to protect the rights of others. The law is not on the other hand prepared to take the more draconian step of proscribing the group irrespective of the peacefulness or otherwise of its activities, believing that such a step would be an affront to principles of democracy and pluralism."[687]

It would seem that while the authorities take a relatively procedural approach to the expression of ideas by political parties, they employ a more substantive approach towards the protection of the rights of others with respect to individual expression.[688] This contention is afforded enhanced credibility when one examines the outcomes of and reasoning applied in what have become known as the Norwood cases.

5:5:1: The Norwood Cases

In 2003,[689] Mark Norwood, a local organizer for the aforementioned BNP appealed a criminal conviction he received the previous year for causing alarm and distress,[690] an offence aggravated by racial and religious components.[691] The circumstances of the case were that the appellant had placed a poster produced by the BNP in his window which showed pictures from the September 11 terrorist attack alongside statements which read as 'Protect the British people' and 'Islam out of Britain.' The poster also displayed Islamic symbols such as a crescent and stars under a prohibition sign.[692] Despite the claim by the defence that the conviction represented an unwarranted interference with his right to freedom of expression under Article 10 of both the

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[687] Steve Foster, *Human Rights and Civil Liberties*,2nd Edition, Pearson Education, 2008, 493
[688] The question of whether this should be the case is a matter of legitimate controversy and will be discussed in later chapters especially the concluding one – For a critical view of this paradigm-see Stefan Sottiaux and Stefan Rummens, 'Concentric democracy: resolving the incoherence of the European Court of Human Rights case law on freedom of expression and freedom of association' in *International Journal of Constitutional Law*, Volume 10(1), 106-126
[689] *Mark Anthony Norwood v Director of Public Prosecutions* 2003 WL 21491815
[690] Public Order Act 1986 c.64, s5 (1) (b)
[691] Crime and Disorder Act 1998 c.37, ss 28 and 31
[692] *Norwood*, Op cit at 6

Human Rights Act and ECHR,[693] the Court agreed with the prosecution that the appellant's clear intent was to express the opinion that the Islamic religion was a threat to Britain and therefore not welcome.[694] Consequently, the conviction was judged to be justified with reference to the legitimate aims under Article 10(2) of both preventing crime and disorder and protecting the rights of others.[695]

> The poster was a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people.[696]

The appellant then took his case to the European Court of Human Rights[697]and alleged a breach of his Article 10 rights.

> "… free speech includes not only the inoffensive but also the irritating, contentious, eccentric, heretical, unwelcome and provocative, provided that it does not tend to provoke violence. Criticism of a religion is not to be equated with an attack upon its followers."[698]

However, after referencing Article 17[699] of the Convention known as the abuse of rights clause, the Court refused to consider the merits of the case under Article 10 holding that the application was inadmissible under Article 17.

> 'The general purpose of Art.17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the

[693] Ibid at 27
[694] Ibid at 30
[695] Ibid at 40
[696] Ibid at 33
[697] *Norwood v United Kingdom* (2005) 40 E.H.R.R. SE11
[698] Ibid
[699] "Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein …"

> principles enunciated by the Convention. The Court, and previously, the European Commission of Human Rights, has found in particular that the freedom of expression guaranteed under Art.10 of the Convention may not be invoked in a sense contrary to Art.17… The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Art.17, which did not, therefore, enjoy the protection of Arts 10 or 14.'[700]

The decision to remove Norwood's expression from consideration under Article 10 has generated a number of criticisms. Steve Foster[701] has argued that the use of Article 17 to justify suppression of speech instead of utilising the qualifying provisions listed in Article 10(2) means that the Court is likely to be prepared to allow major restrictions on expression purely 'on grounds of the nature of the speech rather than its proven or likely harm.'[702] Sophie Turenne has suggested that the absence of a requirement to prove the imminence or likelihood of harm sets a template for over-invasive interventions with political rights as proof of imminent or likely harm was clearly absent in the Norwood case

> "One might rather say that Norwood was "aiming" only to further his cause at a local political level, for he could hardly have contemplated that the publication of his poster in his home in

[700] Norwood, 2005, Op cit
[701] Steve Foster ' Case Comment: Racist Speech and articles 10 and 17 of the European Convention of Human Rights' in *Coventry Law Journal*, Vol 10(1), 2005,
[702] Ibid,94

> Shropshire would lead to a revolution among the public which would lead to the expulsion of all Muslims."[703]

Ivan Hare has further developed these criticisms by contending that allowing for the suppression of expression on the grounds of the nature of the speech alone may potentially facilitate a massive contraction in what is considered to be legitimate political debate.

> "…the state will (especially in times of particular religious or cultural sensitivity) be able to restrict or prohibit with impunity the expression of unpopular views by those who do not espouse mainstream liberal positions. If this is permitted to occur, the essential contribution which pluralism, tolerance and broadmindedness make to the definition of a democratic society under the Convention is substantially negated."[704]

In contrast to these criticisms, Richard Mullender has spoken in favour of the decision reached in *Norwood.* Whilst acknowledging that it has negative implications for 'rights based protection to political expression'[705] Mullender argues that the suppression of speech intended to destroy or heavily interfere with the rights of others may be necessary to sustain a society where all citizens perceive that their interests are being considered.

> "But we have to set against this the consideration that the ECHR's response to the defendant's conduct underscores the importance of distributive justice in a society committed to militant democracy. For it gives expression to the view that entitlements enjoyed by individuals are not absolute guarantees. Rather, they are contingent on willingness to act in ways that serve to sustain a legal order in

[703] Sophie Turenne, 'The compatibility of criminal liability with Freedom of Expression' in *Criminal Law Review,* 2007, 874
[704] Ivan Hare 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred' in *Public Law,* Autumn 2006, 530
[705] Mullender, Op cit,346

> which the fundamental interest of all the law's addressees enjoy a significant measure of protection."[706]

In 2006, the UK government introduced a [707]law which created a new offence of incitement to religious hatred. While the legislation generated much controversy, both supporters[708] and opponents[709] of it have inferred an element of linkage between its introduction and the recent creation of the offence of glorification of terrorism discussed earlier: the suggestion being that the incitement legislation represented a trade off with the Muslim community who had been angered by the glorification provisions. While critics such as Hare view such a trade-off in cynical terms and with 'suspicion',[710] Mullender views it again as a praiseworthy attempt to establish a degree of harmony within society.

> "In criminalizing incitement to religious hatred, the government also wished to demonstrate that it would balance its anti-terrorism legislation with a provision serving the interests of Muslims. This suggests a commitment…to the ideal of distributive justice. This ideal specifies that public institutions…should defensibly accommodate the interests of all society's members. To act in accordance with this ideal is to adopt an approach to practical life that we might categorize as 'principled'. For our aim is to establish basic terms of social life that all relevant persons could endorse."[711]

The nature of the polity described by Mullender bears a striking resemblance to that envisaged by the philosopher John Rawls who argued that a rational society would require an 'equal right…to equal basic liberties'[712] alongside the development of 'an overlapping consensus' of 'reasonable…doctrines'.[713] The problem with Rawls's view is that the idea of a 'reasonable consensus' is (as argued in the introductory

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[706] Ibid
[707] *Racial and Religious Hatred Act,* 2006, c.1
[708] Mullender, Op cit, 343
[709] Hare, Op cit, 538
[710] ibid
[711] Mullender, Op cit
[712] John Rawls, *A Theory of Justice,* revised edition, Oxford University Press, 1999, 220
[713] John Rawls, *Political Liberalism,* Columbia University Press, 1993, 10

chapter of this thesis) inherently exclusionary in that positions that are not accepted as reasonable are immediately deemed unreasonable and thus placed outside what is deemed an acceptable paradigm. This arguably represents what has begun to happen within the United Kingdom in the last decade or so. In pursuit of the ideal that all citizens have an equal stake and interest in the success of the polity, those ideas that may be deemed offensive to either the majority or recognisable minorities are subject at least at the individual level to greater restriction than before. Hence, new restrictions have been placed on the expression of those who refuse to accept racial and religious diversity as well as those who have expressed a belief in the previous and possibly continuing utility of violence as a political tool. While the role of political parties in contributing to the processes of both collective deliberation and popular sovereignty remain largely unchecked, a creeping tendency to place restrictions on some forms of individual and collective expression inevitably places limitations on the extent to which fundamental disagreement is tolerated and thus potentially reduces the variety and quality of sources intrinsic to the epistemic quality of democratic governance.

5:6: Conclusion: The United Kingdom and the Four Principles

In conclusion, it is the contention of this chapter that in relation to the protection of the political rights of expression and association that while the United Kingdom has operated within a primarily procedural paradigm; there exists evidence of a growing tendency to allow restrictions for substantive ends. The formal legal context within which political actors have traditionally operated (in the form of parliamentary sovereignty and an unwritten constitution) is suggestive of a scenario where the protection of equal respect in the form of political rights is intensely vulnerable in the face of the power of parliament as the focal point of popular sovereignty to enact unlimited change. While it is true that throughout the 20th Century, the due process rights of individuals who were deemed to pose a challenge to the stability of the state were often interfered with, the continuing ability of political organizations in the form of political parties to challenge and dissent from those in power continued to be protected. This relative freedom can partially and incongruently be explained by the lack of formal constitutional recognition of parties and thus a lack of a constitutional basis for their regulation. This is supplemented by an overriding legal attachment to a

concept of political representation that views parties as primarily private associations to which individual members of parliament ascribe their allegiance

Conversely, there has been an escalation in restrictions on both individual and some forms of collective expression in the early years of this century. Given the absence of a tradition of 'militant democracy' in British legal discourse, it is contended that the restrictions provided by legislation on terrorism and 'hate speech' can be primarily attributed to the desire to achieve the substantive outcomes of protecting both public safety and respect for the rights of others as elements of social cohesion and stability rather than a desire to protect democratic governance in itself. However, these substantive goals were given explicit legal recognition as a justification for restricting political rights by legislation which was designed to give effect to those same rights into domestic law. Again as before, there seems to be a lack of coherence between legal intent and actual effect. Also, the passage of such restrictions within a similar time period is suggestive of an intention to establish a society premised on a consensual embodiment of equal respect free of fundamental disagreement and what are deemed to be unreasonable opinions. This scenario requires not only right based limitations placed on democratic outcomes to limit 'unreasonable' change but also restriction of 'unreasonable' manifestations of those rights to ensure that certain outcomes are not only not achieved but never considered

However, it would be a mistake at this stage to overemphasize the overall effect of such intentions. The restrictions legislated for have more than often been placed on expression of the preferences of individuals rather than the collective articulation of those exemplified by political parties. Despite the lack of formal legal recognition afforded to parties, the authorities have shown a propensity (in the cases of Sinn Fein and the BNP) to protect their continued right to both articulate ideas and contest elections on the basis of policies well outside of the mainstream. Whether such tolerance has been motivated by primarily pragmatic concerns or is based on an acknowledgement of the fundamental role of both political parties and disagreement in a democracy is a matter of conjecture. Indeed, the motivations for tolerance are probably fluid with respect to both the specific parties in question and the composition of elected governments at any specific point in time. The intrinsic flexibility within the UK system makes it therefore uncertain as to whether the same degree of

tolerance will be afforded in the future and thus it is unclear whether all manifestations of political parties will be relatively free to operate as they have in the past and continue to seek political and social change by representing the views of their members within public discourse and at the ballot box.

The final substantive chapter concerns the jurisdiction of the United States. It has at least a couple of similarities to the United Kingdom. Firstly, like the UK, it can be located within a mainly procedural paradigm in that it tends not to initiate legal restrictions against political parties although other collective entities may be subject to regulation. Secondly, the focal points of legal restrictions within the political arena tend to concentrate on individuals rather than parties. Where the two jurisdictions primarily differ is that the traditional relative lack of restrictions in the UK can be at least partially explained (somewhat counter-intuitively) by the absence until fairly recently of formal constitutional protection and thus explicit grounds on which restrictions can be justified. Conversely, the lack of restrictions in the US are explicable because of the formal constitutional protection that exists for rights of expression and association under the First Amendment which unlike the rights established under the ECHR and Human Rights are deemed to trump any competing societal interest.

CHAPTER 6

The United States, Free Speech and Militant Democracy

6:1 Introduction

> "Among western liberal democracies, the USA…appears closest to manifesting the attributes of a procedural view of democracy."[714]

The final jurisdictional context which this thesis is concerned with is the United States of America. The choice of placing the United States as the final substantive case study is influenced by two distinct yet complementary trends regarding the scope of as well as the intention behind legal intervention. Firstly, given that the primary focus of the thesis concentrates on the legitimacy or otherwise of legal restrictions on collective political entities such as political parties, the tendency of US constitutional law to primarily focus any restrictions on individuals rather than collective organisations locates the USA at the protective end of a sliding scale of legally sanctioned interventions within the political arena when compared to other polities. Next, with respect to the debate surrounding the efficacy or desirability of legal restrictions on political expression for the purpose of ensuring that '…democratic processes are not used to destroy democracy'[715], the United States of America is widely acknowledged to represent an example of a polity where the constitutional right to free expression acts as a judicial trump card against attempts to legislate in order to protect democracy. In theoretical and practical terms, this situation tolerates not only a challenge to or potential displacement of 'settled democratic norms and values'[716], it also 'confers a degree of latitude for political expression and extremist political associations far exceeding that to be found in other western liberal democracies.'[717] This chapter will acknowledge the historic and contemporary existence of a narrow template for legitimate restrictions and will attempt to explain the reasons for this.

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[714] Ian Cram, 'Constitutional responses to extremist political associations –*ETA*, Batasuna and democratic norms' in *Legal Studies,* Volume 28(1), 2008, 75
[715]Mark Tushnet 'United States of America' in Markus Thiel (ed) *The 'Militant Democracy Principle in Modern Democracies',* Ashgate Publishing, 2009, 357
[716] Cram, Op cit
[717] Ibid, 76

However, it will also argue that while the US operates within a primarily procedural paradigm; to identify the United States as a purely procedural democracy would be to ignore both historic and recent decisions that veer in a more militant direction. It will proceed to contend that freedom of expression and association can be justified for a variety of reasons including being a key component of both individual autonomy and a well functioning democracy and consequently, their protection under the First Amendment should attempt to strike a balance between sometimes conflicting factors and consequently between the four guiding principles identified in the introduction. Finally, it will analyse two cases that have emerged from the Supreme Court in 2010. It will assess their implications in terms of both the degree of latitude afforded to free expression and the balance they strike between the four principles. It will argue that these decisions display a dual inconsistency; both in relation to previous Court decisions and the balance they strike between the principles fundamental to the epistemic quality of democracy.

6:2 Free Speech and the First Amendment

6:2:1 Why Free Speech?

In regard to a justification of a right of freedom of expression, Eric Barendt has identified a number of compelling arguments.[718] These include the contention that free expression is a necessary component of both individual autonomy[719] and effective citizen participation in a democracy.[720] There is no doubt that ideas relating to individual autonomy and democratic participation can be and are often mutually reinforcing. From the perspective of the four principles , this mutual reinforcement suggests a relationship of circular dependence between an autonomy based conception of equal respect and the processes related to popular sovereignty. The preservation of equal rights to autonomous free speech and association are viewed as crucial elements in providing arenas for collective deliberation which will help the electorate make an informed decision on how to cast their vote. Similarly, the power to remove temporal representatives afforded to the people through the processes of popular sovereignty

[718] Eric Barendt, *Freedom of Speech, 2nd Edition* (Oxford University Press) 2005, 6-23
[719] Ibid, 13-18
[720] Ibid, 18-21

makes those wishing to represent or continue to represent the people potentially wary of interfering with or advocating interference with their autonomous political rights.

> "Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power."[721]

The constitutional provision which has most relevance for concerns relating to establishing such a symbiotic relationship is the First Amendment to the United States Constitution.

6:2:2 The First Amendment

The First Amendment states

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"[722]

Two things are immediately apparent from a reading of the amendment. Firstly, it appears absolutist in tone. The phrase 'Congress shall make no law…' suggests at the very least a basic unwillingness to tolerate legislative restriction of free expression enacted by popularly elected representatives. As we have seen with reference to those countries considered earlier, while the United States Supreme Court has qualified the formal absolutism of the text, it is legitimate to contend that it is and has been generally more protective of free speech than the courts of other comparable democracies. Samuel Issacharoff has described this tendency as evidence of an

[721] Alexander Meiklejohn, 'The First Amendment is an Absolute' in *The Supreme Court Review, 1961, 257*
[722] First Amendment to the Constitution of the United States, 1791

'American Exceptionalism'.[723] With respect to the specific issue of party prohibition, what is also immediately apparent is that the First Amendment does not explicitly guarantee freedom of association. As we shall again see, however, the Supreme Court has read a right to associate for political ends into the First Amendment and consequently enacted restrictions on political association have been challenged under the individual right to freedom of expression.[724] A less obvious but as important matter of relevance is that the jurisprudential approach applied to restrictions on political advocacy is primarily derived from principles of criminal rather than constitutional law.[725] This has a number of consequences. Firstly, the focus of restrictions tends to be on the individual rather than the group. It is therefore more likely that individual membership of a particular group will be made illegal rather than the existence of the group itself.

> "On a deeper level, US constitutional law is committed to principles of individual responsibility…When the government claims that a political party or group threatens democracy, the individualistic tendency in U.S. Constitutional law almost instinctively shifts from the group to its individual members."[726]

Next, this emphasis on individual responsibility has made the courts suspicious of any attempt to validate restrictions on the premise of 'guilt by association'[727] and therefore, membership of a subversive organization has not, in the absence of illegal action, been deemed to constitute sufficient grounds for imposing restrictions. Consequentially, the Courts therefore tend to disallow any restrictions on free speech or association rights which are independent of criminal sanctions.

> "Put another way, satisfying the standards for criminal liability is a predicate for the imposition of any sanction or disability."[728]

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[723] Samuel Issacharoff, 'Fragile Democracies' in *Harvard Law Review*, Volume 120 (6), 2007,1415
[724] Cram, Op cit, fn, 35
[725] Tushnet, Op cit, 359
[726] Ibid, 376
[727] Ibid, 359
[728] Ibid

However, these factors as well as the apparent symbiosis between autonomy and democratic participation do not necessarily imply that freedom of expression has always been or always is well protected. Later, it will be argued that a proper balance between ideas of autonomy and citizen participation is necessary for a consistent level of protection to be achieved. More specifically and practically, the level of protection that the condition to satisfy the standards of criminal liability requires is directly related not only to judicial doctrine but also to how wide or narrow is the range of speech or behaviour that relevant legislation imposes criminal sanctions upon. As the next section shows, the journey to an approach protective of free speech rights has neither been linear nor completely consistent.

6:2:3 Subversive Advocacy Cases

The first important decisions taken by the Supreme Court with regard to subversive advocacy arose out of the United State's involvement in World War I and its subsequent attempt to intervene militarily against the new Communist regime in Russia. In *Schenck*[729] and *Abrams*[730], the Supreme Court upheld prosecutions for 'conspiracy'. The specific conduct deemed to constitute 'conspiracy' was obstruction of military planning and interference with war production and respectively took the form of the distribution of pamphlets and the making of critical speeches. Justice Holmes argued

> "The character of every act depends on the circumstances in which it is done…The question in every case is whether the words are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." [731]

Effectively, the prosecutions were upheld on the basis that the actions of the defendants amounted to a *clear and present danger* of bringing about the substantive evil of a military defeat. The importance of these cases with respect to freedom of

[729] *Schenck v United States*, 249 U.S. 47 (1919)
[730] *Abrams v United States* 250 U.S. 47 (1919)
[731] *Schenck*, Op cit, 52

political expression is that the Court acknowledged that Congress, as the primary organ of popular sovereignty, had the right to qualify equal protection in order to prevent such a substantive evil from occurring. Subsequently, relevant First Amendment cases concerned themselves with what exactly a determination of the existence of a *clear and present danger* required. Just as the original cases arose out of the United State's military involvement in the First World War, subsequent jurisprudential clarifications of *clear and present danger* emerged from cases concerned with legislative restrictions that were passed on the brink of further military involvement; this time relating to World War II. In 1940, Congress passed the *Smith Act.*[732] While this Act was directed at both Fascist and Communist groups, its subsequent application in the post-war Cold War era tended to be invoked against members of Communist organizations. Although, primarily concerned with the actions of individuals rather than the status of groups, it criminalized advocacy by any individual who

> " …knowingly or wilfully advocates, abets, advises or teaches the duty, necessity, desirability or propriety of overthrowing the government of the United States…[or] organizes or helps to organize any group[to do so]; or becomes or is a member or…any such society, group, or assembly of persons, knowing the purposes thereof."[733]

While it can be argued that the motivations behind the passage of the *Smith Act* were similar to those behind the prosecutions pursued in the earlier cases; in that they were both undertaken within the shadow of existing or impending military conflict, the Smith Act undoubtedly widened the interpretative scope of advocacy constitutive of a clear and present danger. It represented an attempt by Congress to restrict advocacy which challenged the continuing existence and validity of democratic government. In doing so, it placed limits on the advocacy of change. In the subsequent case, *Dennis,* [734]the Court in upholding the conviction of eleven members of the Communist Party of the USA under the Smith Act focussed on whether it was constitutional to

[732] 18 U.S.C. ss2385
[733] Ibid
[734] *Dennis v United States,* 341 U.S. 494 (1951)

criminalize advocacy of the overthrow of the government when such advocacy was not accompanied by concrete action.[735] Chief Justice Vinson argued that

> "In each case, [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[736]

The Court proceeded to argue that because the gravity of the threat (namely the overthrow of the government) was so serious that 'only a slight probability of its realization was necessary to justify the invasion of speech rights.'[737]

> "The Government need not wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a cause whereby they will strike when the leaders feel the circumstances permit, action by the government is required."[738]

The preservation of democratic government was thus perceived as an ultimate value to which the protection of free speech was subordinate.[739]Consequently, the equal procedural protection of political advocacy could be diluted if and when specific advocacies were held to be incompatible with the substantive goal of the maintenance of a democratic system of government. The adoption of 'a rule that the gravity of a danger could compensate for its lack of imminence'[740] set a potentially wide template for future highly restrictive interventions; especially in the context of the Cold War.

> "… when few believed that a Communist takeover was near at hand-the evil was quite improbable-but such a takeover if it

[735] Paul Franz 'Unconstitutional and Outlawed Political Parties: A German-American comparison' in *Boston College International and Comparative Law Review,* Volume 5, (1982), 72
[736] *Dennis,* Op cit, 510
[737] Franz, Op cit, 73
[738] *Dennis,* 509
[739] Franz, Op cit
[740] Dan Gordon 'Limits on Extremist Political Parties: A comparison of Israeli Jurisprudence with that of the United States and West Germany in *Hastings International and Comparative Law Review,* Volume 10, (1986-87), 377

> occurred, would be enormously harmful. The test allowed the government to punish people who posed an extremely small risk of very great harm."[741]

However, only six years later, the Court began a long and substantive retreat from the wide latitude afforded by *Dennis.* In *Yates*[742], the Court overturned convictions achieved under the *Smith Act* by reinterpreting the notion of the gravity of an implied danger. It did so by making a clear distinction between advocacy as abstract doctrine and advocacy as a direct incitement to unlawful action. The *Smith Act* could not be construed as allowing the prohibition of

> " advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in, with[out] evil intent."[743]

In *Brandenburg,* [744]the Court moved beyond the distinction utilized in *Yates.* In striking down the conviction of a Ku Klux Klan leader under a criminal syndicalism statute, the Court argued that for a restriction to be legitimate, the relevant speech must not only be directed at producing unlawful action but the said action must also display a degree of imminence.

> "…the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting

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[741] Tushnet, Op cit, 362- This trend was afforded legislative recognition in 1954 with the passage by Congress of the Communist Control Act of 1954 – 50 U.S.C. ss841-844- This law specifically targeted the Communist Party of the USA and was designed to deny the party *inter alia* access to local, state or national ballots. However, according to Mary McAuliffe, the Act was merely a symbolic political act designed to allay fears during the McCarthy period and had 'no significance as a piece of anti-communist legislation' – Mary McAuliffe, 'Liberals and the Communist Control Act of 1954' in *The Journal of American History,* Vol 63(2), 1976, 366

[742] *Yates v United States,* 354 U.S. 298, (1957)

[743] *Yates,* Op cit

[744] *Brandenburg v Ohio,* 395 U.S. 444 (1969)

> or producing imminent lawless action and is likely to incite or produce such action."[745]

In practical terms, while the cases of *Schenck* and *Dennis* acknowledge the right of legislators to place limits on the advocacy of undesirable change, the cases of *Yates* and *Brandenburg* shift focus away from the content of proposed change to the means and methods employed to achieve it.

> "The Court has thus set the mould for contemporary United States Jurisprudence, which puts the emphasis on the means used by the group, while…opposing any restrictions on a group based on its goals or platform."[746]

This shift reflects an adjustment of judicial perception relating to the protections afforded by the First Amendment. Instead of identifying such protections as factors which are subordinate to the protection of substantive outcomes such as democratic procedures, they are perceived as a procedural check on the substantive legislative outcomes which may emerge from such procedures. By contrast, the following section will analyse relevant legislation and jurisprudence whose primary concerns relate to neither the continued existence of the processes of popular sovereignty nor to the potential iniquities that such processes may produce but rather to the continued right of citizens both individually and collectively to participate within them.

6:2:4 the Regulation of Political Parties

While it is evident that the focus of legislative restrictions on potentially subversive advocacy has been on individual membership of an organization rather than the existence of the organization itself, this does not mean that political parties have been immune from legislative attempts to restrict their operation. The main method by which individual states have attempted to restrict the operation of potentially subversive parties has lain in their power to regulate access to the ballot.[747]As Bradley Smith has pointed out, States have utilized numerous requirements such as petition

[745] *Ibid*, 447
[746] Gordon, Op cit, 371
[747] Bradley. A. Smith 'Judicial Protection of Ballot Access Rights: Third Parties need not apply' in *Harvard Journal of Legislation*, Volume 28, 1991

drives, early filing deadlines and loyalty oaths to restrict access.[748] In a similar fashion to subversive advocacy cases post *Yates*, the relevant Supreme Court jurisprudence demonstrates suspicion of, if not downright hostility to, attempts to restrict ballot access. With respect to the requirements of petition drives and early filing deadlines, the case of *Williams v Rhodes*[749] is instructive.

In 1948, the Ohio legislature passed legislation that set restrictive requirements for granting prospective candidates access to the Presidential ballot. These included the filing of petitions requiring the signatures of citizens quantifying at least 15% of the votes cast at the previous gubernatorial election and the filing of such petitions at least nine months before Election Day.[750] In 1968, the presidential candidate, George Wallace was initially denied a place on the Ohio presidential ballot because although his supporters in the American Independent Party had managed to acquire a petition containing the requisite number of signatures, it was filed well after the statutory deadline.[751] In the subsequent case, the Supreme Court overturned the Ohio Statute and ordered Wallace's name to appear on the ballot. It argued that the relevant Ohio statute violated both the First Amendment and the 'equal protection' clause of the Fourteenth Amendment.[752] This was because the relevant law placed an unreasonable burden on 'two different but overlapping kinds of rights.'[753]These were the 'right of individuals to associate for the advancement of political beliefs' and the 'right of qualified voters…to cast their votes effectively.'[754] The Ohio Statute was deemed to be constitutionally invalid because it diluted both the right of political parties to present candidates for legislative or executive office and, as a consequence, the right of the individual voter to exercise a meaningful ballot.

> "Though Ohio did not prohibit the formation of political parties, the right of association could be rendered meaningless by prohibiting parties from appearing on the ballot. Likewise, the right to vote

[748] Ibid, 172-177
[749] *Williams v Rhodes*, 393 U.S. 23 (1968)
[750] Smith, Op cit, 178
[751] Ibid
[752] Fourteenth Amendment to the Constitution of the United States of America, Section 1, 1868
[753] *Williams*, Op cit, 30
[754] Ibid

> would lose its meaning if voters were limited to just one or two government approved parties."[755]

With regard to the specific issue of a loyalty oath, the Supreme Court also found such a requirement to constitute a violation of the First and Fourteenth Amendments. In *Communist Party of Indiana v Whitcomb*[756], the Court was faced with the question whether an Indiana Statute explicitly requiring political parties to renounce advocacy of the forcible overthrow of the government before access to the ballot was granted was constitutional.[757] The Court found that the principles expounded in *Brandenburg* with respect to subversive advocacy applied also to the ability of political parties to both argue their case and contest elections.

> "The principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action, applies to state regulation burdening access to the ballot, rights of association in the political party of one's choice, casting an effective ballot, and in running for office, which are interests as substantial as those in other areas… For purposes of determining whether to grant a place on the ballot, a group advocating violent overthrow as abstract doctrine need not be regarded as necessarily advocating unlawful action."[758]

The common thread linking these two cases is that both interpret the First Amendment in a way that not only protects an equal right to autonomous expression but protects the right of a citizen to participate meaningfully within the processes of popular sovereignty. This requires, first of all, protection of the right of individuals to associate for political ends. It also requires an acknowledgement of the right of each

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[755] Smith, Op cit, 179
[756] *Communist Party of Indiana v Whitcomb*, 414 U.S. 441, 1973
[757] Indiana Ann. Stat. Section 29-3182, (1969) which states
"[n]o existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government **by** force. or violence…"
[758] *Communist Party*, Op cit, 442

individual citizen to cast a meaningful ballot. The effective realization of each right depends in large part on the protection of the other. In recognition of this, the Supreme Court placed limits on the ability of elected representatives to themselves place limits on which candidates and/or ideas can be afforded representation through the processes of popular sovereignty. Ian Cram argues that the adoption of such an approach makes the prohibition of a political party within the United States extremely unlikely.

> "…the proposition that the state might compel the closure of a political party on account of its professed non-conformity with substantive democratic principles is plainly a non-starter. The majority are simply not permitted to deny the minority the right to be represented."[759]

It is evident therefore that the characterisation of the United States as a primarily procedural democracy at least partially emanates from the balance the Court has (with exceptions) struck between the protection of an equal right to autonomous expression and an equal right to participate fully in the processes of democratic government. The remainder of this chapter will attempt to achieve a number of objectives. Later, it will argue that the balance that has been struck between the complementary yet potentially conflicting values of individual autonomy and democratic participation has been potentially undermined by two recent cases. Next however, it will move beyond acknowledgement of a relative lack of successful militant democratic measures within the American polity to attempt to provide an explanation for this reality.

6:3 Explanations for lack of restrictions

There are numerous factors which have contributed to a relative lack of restrictive measures within the contemporary American polity. Firstly, from a purely legal perspective, it is difficult to enforce them. As has already been discussed, attempts to restrict political speech or enforce political prohibitions have largely been exercised through the criminal code. Thus, subsequent measures regulating rights of political speech and association '… [have] become inextricably bound up with the standards of

[759] Cram, Op, cit, 76

criminal prosecution, including burdens of proof or heightened specificity requirements'.[760] One of the reasons why this may be the case is that there exist structural factors within the American political system which 'provide a buffer against anti-democratic forces.'[761]The consequent weakness of anti-democratic forces may therefore explain why '…American law is decidedly directed to the truly marginal behaviour that might give rise to a criminal offense.'[762] Samuel Issacharoff has identified at least two components of the American political system which contribute to both a lack of extremism and a subsequent degree of stability. The first component is that the First Past the Post electoral system utilised within the United States makes it extremely difficult for extremist candidates to gain office. As has long been acknowledged in political theory,[763] the existence of a single district, single winner electoral system has a propensity to 'produce two and only two relatively stable, relatively centrist parties.'[764]

> "Because districted elections force the prospective governing coalitions to form *before* the election and to run as political parties, the inclusion of extreme candidates discredits the entire slate and forces such candidates to the margin. As a result, extreme candidates face formidable hurdles to attaining legislative office."[765]

Secondly, Issacharoff argues that the existence of a Presidential rather than a parliamentary system of government provides a further degree of stability. Even if anti-democratic parties were to overcome the barrier of the electoral system and achieve some degree of representation in Congress, the Presidential system would ensure that their ability to disrupt the work of government would be limited. As opposed to some countries with purely parliamentary systems[766], small parties could neither 'leverage their small presence into significant commands on public policy'[767] nor subsequently bring down fragile coalition governments.

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[760] Issacharoff, Op cit,1417
[761] Ibid, 1419
[762] Ibid
[763] Maurice Duverger, *Political Parties*, Revised Edition Methuen Press, 1964, 217-28
[764] Issacharoff, 2007 Op cit
[765] Ibid
[766] Examples include Italy and Israel
[767] Issacharoff, 2007 Op cit, 1420

> "There are many reasons to be wary of presidentialism, but it does serve as a buffer to the threat posed by marginal parties' ability to insinuate themselves into parliament and disrupt governance from within."[768]

In addition to practical explanations for the relative lack of restrictive actions, there exists a fundamental reason inherent to the Constitution itself. This is the fact that the United States Constitution within a paradigm of liberal individualism is legally neutral with regard to the pursuit of and attachment to ideological goals by individuals or collective groups of individuals. This neutrality is in direct contrast to other democracies such as Germany whose Constitution is specifically committed to the protection of principles such as 'human dignity'[769] and the 'free democratic basic order.'[770] This has two consequences. Firstly, while in Germany, the pursuit of specific goals which are contrary to the principles referenced above may render a party constitutionally invalid. In the US, because the Constitution is legally neutral towards the achievement of substantive outcomes, the pursuit of specific goals is legally irrelevant as long as they are sought by legal means or not striven for through the incitement of illegal acts. Therefore, there is no constitutional basis for diluting procedural equality in the name of protecting the Constitution and accordingly, a political party cannot therefore be rendered constitutionally invalid by its desire to overthrow the existing system of government.

> "American constitutional neutrality is almost a logical necessity: there is no right of revolution *because* there are no substantive limits on procedurally lawful change under the American Constitution. If realisation of certain political goals is precluded by the Constitution, revolution would become, if not a right, then a practical necessity for proponents of those goals."[771]

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[768] Ibid
[769] Basic Law of the Federal Republic of Germany (1949), Article 1
[770] Ibid, Articles 18, 21(2) and 91(1)
[771] Franz, Op cit at 85

Such assertions illustrate the constitutional incoherence of earlier cases such as *Dennis*. In justifying restrictions on the advocacy of overthrowing the government by referring to the danger that such advocacy posed to 'government', it was effectively placing a protective wall around a Constitution which by its own neutral logic is potentially subject to unlimited change.

> "Yet 'Government' if taken to mean a set of institutions has no 'self' to preserve. The American Court has invoked the right of government to preserve a 'self' that the justices themselves see as mutable without limit."[772]

Secondly, with specific reference to free speech, the aforementioned neutrality towards ideological goals means that in cases concerned with political expression, arguments for a limitation or qualification of absolute freedom based on the necessity or desirability of a relevant competing interest are placed at a significant disadvantage.

> "…the absence of constitutionally specifically protecting human dignity or cognate ideas means that the only constitutional interest at play is the interest in free expression, and balancing a constitutional interest against non-constitutional ones systematically produces rules protective of speech."[773]

It is evident, therefore, that the relative lack of restrictive provisions can be partially explained in terms of the both overall stability of the American political system and within the logic of its own Constitution. This primarily procedural approach has also been underpinned by judicial reasoning which has attempted to establish a relationship of, if not mutual dependence, certainly peaceful co-existence between ideas relating to both individual autonomy and popular sovereignty. Such a relationship is not, however, automatic. An interpretation of political rights which relies too heavily on one conception poses a theoretical and potentially practical threat to maintenance of a sustainable balance between the two. The following section will

[772] Ibid, 88
[773] Tushnet, Op cit, 376

establish theoretical tensions and contradictions between them and will conclude by discussing recent cases which have dealt with such tensions by favouring one principle at the expense of the other thus endangering the balance necessary for effective protection of political rights.

6:4 Imbalanced Principles

6:4:1 Popular Sovereignty as an impediment to Autonomy

The 'argument from democracy'[774] can be summarised in the following way.[775] Effective democratic accountability depends upon an informed electorate able to assess a government's performance. Such an assessment is contingent upon the electorate having access to information that has a bearing on government performance. Consequently, there should be no restrictions on expression which can potentially contribute to such an assessment. As Barendt has noted, such an argument is 'firmly utilitarian or consequentialist'.[776] Freedom of expression is justified in terms of its potential contribution to democracy and it subsequently echoes *Dennis* in that it places freedom of expression in a subordinate relationship to democracy. This has potentially profound repercussions. Firstly, if the role of free speech is to safeguard or advance democracy then it is logical to argue that expression which threatens democracy should not be protected. This is exactly the position taken by the Court in *Dennis.* Secondly, if freedom of expression is subordinate to the maintenance of democracy, could it not be argued that the suppression of speech by a democratically elected majority is legitimate?

> "…the very notion of popular sovereignty supporting the argument from democracy argues against any limitation on that sovereignty, and thereby argues against recognition of an independent principle of freedom of speech."[777]

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[774] Barendt, Op cit, 15
[775] Larry Alexander, *Is there a right of Freedom of Expression?*,(Cambridge University Press) 2005, 136
[776] Barendt, Op cit,19
[777] Frederick Schauer, *Free Speech: A Philosophical Enquiry*,(Cambridge University Press) 1982, 41

This potential challenge to speech and association rights may acquire enhanced legitimacy if the act of suppression is itself supported by the majority of the electorate as well as a majority of their elected representatives.

6:4:2 Autonomy as an impediment to Popular Sovereignty

The existence of the First Amendment as an integral component of the Constitution represents both a symbolic and practical refutation of the idea that free speech is subordinate to democracy. Thus, it is clear that the principle of a constitutionally protected right of freedom of expression cannot be grounded solely on its contribution to a system of democratic governance. By contrast, the narrow template for restrictions established by cases such as *Brande*n*burg* suggests a commitment to a conception of political rights which values them as a structural support to the protection of an individual autonomy which is both independent of and protected from the processes and outcomes of popular sovereignty. However, the commitment to such a principle raises legitimate questions. Firstly, there is the question of whether it is democratically legitimate to allow an unelected judiciary's interpretation of rights to act as an obstacle to the wishes of the people in the form of their elected representatives.[778] Secondly, and more pertinently, it raises the question of whether the desire of the Court to protect individual autonomy has led it to preclude regulating spheres of private behaviour which although not undemocratic in intent have deleterious effects on the effective functioning of democracy. As Mark Tushnet has argued

> "The typical targets of 'militant democracy' regulations are extremist groups, but the concept does not have any necessary connection to extremism. Threats to the democratic process from the exercise of constitutional rights closely associated with democracy can emanate from a variety of sources."[779]

One of the perceived threats to the effective functioning of a democracy through an application of an autonomy centred interpretation of political rights is the potentially

[778] For a negative answer to this question- see Jeremy Waldron 'A Right-based critique of Constitutional Rights' in *Oxford Journal of Legal Studies* Volume 13 (1) 18-51 –For a positive answer see John Hart Ely, *Democracy and Distrust*,(Harvard University Press) 1980

[779] Tushnet, Op cit, 357

distorting effect of money on the electoral and legislative process. This issue is not unique to the United States but is undoubtedly most associated with it. It has sparked wide debate between those who wish to regulate campaign finance in order to protect the fairness of electoral procedures and those who equate measures to regulate campaign expenditure with attempts to censor political speech. The debate surrounding this issue illustrates the potential conflict that exists between reading the First Amendment as a protector of individual autonomy or as a structural component of a competitive democracy.

> "Viewed solely as a means of disabling government, a purely "autonomy centered" First Amendment can be affirmatively hostile to democracy by insulating private activity from regulation despite its deleterious effect on democracy. [Any] decision to leave campaign financing hostage to the sum of unregulated private spending decisions is a classic example of the collision between a First Amendment preoccupied with autonomy and a concern for a fair democratic process."[780]

The final section of this Chapter will examine two 2010 cases in which the Supreme Court has made bold and highly controversial judgements which have potentially profound repercussions for the issues discussed in this section and for the ability to strike an appropriate balance between the four principles of democracy. Firstly, in *Holder v Humanitarian Law Project et al*, the decision to uphold a restriction of First Amendment rights and qualify the equal right to autonomous free speech is at least partially based on the identification of a competing public interest alongside a subsequent deference to the other branches of government in pursuit of that interest. Secondly, in *Citizens United,* a decision to overturn legislation which seeks to regulate campaign finance invokes the equal right to autonomous speech to invalidate legislative attempts to equalize the conditions under which the processes of popular sovereignty operate.

[780] Burt Neuborne 'Toward a democracy centred reading of the First Amendment' in *Northwestern University Law Review,* Volume 93(4), 1999, 1058

6:5 Holder v Humanitarian Law Project et al[781]

In this case, the Supreme Court upholds legislation that makes it a federal crime to 'knowingly provid[e] material support or resources to a foreign terrorist organization.'[782] For the purposes of the legislation, 'material support or resources' is defined as

> "…any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."[783]

With respect to the prohibitions on providing training and expert advice or assistance, the plaintiffs argued that these represented a violation of their First Amendment rights to speech and association. More specifically they argued that the legislation prohibits them providing legitimate support to two organizations (the PKK and LTTE)[784] who despite having been designated as 'foreign terrorist organizations' by the Secretary of State hold the legitimate political objectives of gaining independence for the Kurds and Tamils from Turkey and Sri Lanka respectively. They further argued that the assistance they sought to provide was both intended and likely to move the relevant organizations away from violence and towards an embracement of legitimate political methods. This assistance was proposed to take the form of training members of these organizations to use international law for the peaceful resolution of disputes and to teach them how to petition representative bodies such as the United Nations for relief. Consequently, the plaintiffs concluded by arguing that the relevant statute's definition of material support should only apply to conduct that were intended to further the groups' illegal objective. However, the Court rejected the plaintiffs' arguments regarding freedom of speech in both general and specific terms.

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[781] *Holder v Humanitarian Law Project et al*, 561 US 2010-Syllabus
[782] 18 U. S. C. §2339B (a) (1).
[783] 18 U.S.C. §2339 A (b) (1)
[784] Partiya Karkeran Kurdistan and Liberation Tigers of Tamil Elan.

6:5:1 Reasoning of Court

Firstly, the Court rejected the plaintiffs' contention that the relevant statute's definition of material support should apply only to conduct intended to further illegal objectives by arguing that knowledge about the recipients' involvement in terrorism was enough to warrant a criminal prosecution

> "The Court cannot avoid the constitutional issues in this litigation by accepting plaintiffs' argument that the material-support statute, when applied to speech, should be interpreted to require proof that a defendant intended to further a foreign terrorist organization's illegal activities. That reading is inconsistent with §2339B's text, which prohibits "knowingly" providing material support and demonstrates that Congress chose knowledge about the organization's connection to terrorism, not specific intent to further its terrorist activities, as the necessary mental state for a violation."[785]

In more general terms, it proceeded to assert that all manifestations of material support are fungible in that they can be used for and diverted to different purposes.

> "Moreover, material support meant to promote peaceable, lawful conduct can be diverted to advance terrorism in multiple ways. The record shows that designated foreign terrorist organizations do not maintain organizational firewalls between social, political, and terrorist operations, or financial firewalls between funds raised for humanitarian activities and those used to carry out terrorist attacks."[786]

With specific regard to the types of speech that the plaintiffs proposed to undertake, the Court argued that training organizations to use international law for dispute resolution would '…provide that group with information and techniques that it could use as part of a broader strategy to promote terrorism, and to threaten, manipulate, and

[785] *Humanitarian Law Project,* Syllabus (b) page 2
[786] Ibid, (d) (2) page 5

disrupt' and that teaching such organizations to petition international bodies for relief 'could help [them] obtain funding [they] could redirect to violent activities."[787] These assertions relating to fungibility were based entirely on the opinion of the executive branch. The Court found that the executive branch's experience in combating terrorism meant that its evaluation '…like Congress's assessment is entitled to deference, given the sensitive national security and foreign relations interests at stake.'[788] Finally, the Court also rejected the plaintiff's claim that their right of freedom of association had been violated by asserting that just as the right to freedom of association can be read into the First Amendment's protection of free speech so could any burden on those rights.

> "Any burden on plaintiffs' freedom of association caused by preventing them from supporting designated foreign terrorist organizations, but not other groups, is justified for the same reasons the Court rejects their free speech challenge"[789]

6:5:2 Implications of Court's reasoning

The reasoning applied by the majority on the Court can be criticised in relation to both the facts of the case and its implications. The contention made by the Court that material support in the form of speech is fungible poses numerous questions regarding the ability of individuals and groups to participate meaningfully to democratic government. Firstly, the refusal to protect the specific speech proposed by the plaintiffs does not meet the requirement of imminent illegality or incitement to imminent illegality found in *Brandenburg.*

In his dissent[790], Justice Stephen Breyer opined

> "Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others how to do the same. No one contends that the plaintiffs' speech to these

[787] Ibid, (d) (3) at 5-6
[788] Ibid
[789] Ibid, (e) at 6
[790] 561 U.S. 2010 (Breyer, J), Dissenting Opinion 1-21

> organizations can be prohibited as incitement under *Brandenburg*."[791]

Next, Breyer criticises the assessment made by the executive branch on the fungibility of the specific speech proposed by the plaintiffs arguing that there is a lack of evidence or reasonable argument identifying potential mechanisms for the redirection of such speech into the creation of resources for more nefarious purposes.

> "The proposition that the two very different kinds of "support" are "fungible," however, is not *obviously* true. There is no *obvious* way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, towards terrorist ends"[792]

More generally, the notion of fungibility itself potentially establishes a precedent which facilitates increasingly wide latitude for the suppression of speech which while innocent in intent may be deemed to be available for use by its recipients for other less legitimate purposes.

> "…the risk that those who are taught will put otherwise innocent speech or knowledge to bad use is omnipresent, at least where that risk rests on little more than (even informed) speculation. Hence to accept this kind of argument without more and to apply it to the teaching of a subject such as international human rights law is to adopt a rule of law that, contrary to the Constitution's text and First Amendment precedent, would automatically forbid the teaching of any subject in a case where national security interests conflict with

[791] Ibid, 4
[792] Ibid, 8

> the First Amendment. The Constitution does not allow all such conflicts to be decided in the Government's behaviour."[793]

Finally, the implications of the Court's reasoning extend beyond simply the acceptance of the notion of fungibility but also involve the process by which such a notion was adopted. The refusal by the majority on the Court to subject the assessment of fungibility to independent scrutiny on the basis that the relative expertise of both the executive and legislative branches in combating terrorism means that their assessment should be afforded deference has potentially profound implications. By deferring to the executive and legislative branch in matters relating to national security and foreign relations, could it not be argued that the Court is potentially establishing a precedent by which the equal protection of free speech can be qualified by the wishes of the majority simply because the fight against terrorism is temporally deemed to be of especially significant value? Such a precedent would potentially place a competing interest, namely national security, in a position to challenge if not the constitutional primacy of free political expression but the present wide interpretation of its scope exemplified by *Brandenburg*.

6:5:3 Humanitarian Law Project and the four principles

With respect to the balance struck between the four guiding principles, a number of considerations emerge from this decision. With regard to the principle of representation, these are relatively minor. Although the legislation in question directly affects the ability of the plaintiffs to assist the relevant groups in petitioning representative bodies on the international stage, it does not deny anyone the right to contest an election or profess an ideological goal. With regard to changeability, the criminalization of material support in the form of speech has substantial implications. Firstly, it inhibits the ability of groups such as Humanitarian Law Project to assist the relevant political groups from challenging the status quo within their own polities by peaceful means. More worryingly, the criminalisation of such assistance may make it less likely that a successful transition from violent to peaceful methods can be achieved. With respect to the principles of equal respect and popular sovereignty, it is clear that the decision to uphold the relevant legislation signifies a significant

[793] Ibid, 14

readjustment. The equal right to autonomous speech is qualified in deference to assessments made by agents of popular sovereignty where it is deemed that they possess the necessary expertise in pursuit of a vital public interest Whether the vital public interest in combating terrorism constitutes sufficient grounds for the qualification of political rights is a complex question that has been discussed in detail in an earlier chapter.[794] However, in relation to this specific case, it is contended that the Court did not convincingly establish a sufficient relationship between the proposed speech and terrorism to warrant criminalisation. Also the prospect that criminalisation may place impediments to the pursuit of peaceful change with regard to both goals and methods leads to a conclusion that the decision to uphold the relevant legislation is unjustified both in terms of its own goals and with reference to the four principles.

6:6 Citizens United[795]

In 2010, the Supreme Court found that legislation[796] prohibiting corporations and unions from using their general treasury funds to make independent expenditures which expressly advocate the election or defeat of a candidate to be unconstitutional. This decision directly overruled an earlier decision known as *Austin*[797]which upheld the constitutionality of a Michigan act that had previously banned corporations from making such expenditures. These legislative provisions are at least partly motivated by a desire to remove the potentially distorting effects of massive corporate expenditure on the electoral process. Such expenditure potentially allows the existence of massive financial disparities to influence the electoral process in a way which removes the substance from the rights to associate and cast a meaningful ballot.

> "…the First Amendment should be read to protect the right to cast a meaningful ballot as the ultimate act of political expression. The First Amendment should be read to protect the right to associate with like-minded people in an effort to influence public policy by running for public office…Contrary to *Buckley*, however, the First

[794] Chapter Two
[795] *Citizens United v Federal Elections Commission,* 130 S.Ct. 876 2010
[796] 2 U.S.C. Section 441(b) as amended by Bipartisan Campaign Reform Act (BCRA) known as McCain Feingold (2002) Section 203
[797] *Austin v Michigan Chamber of Commerce* 494 US 652 (1990)

> Amendment should not be read to protect unlimited campaign spending that vests disproportionate political power in the very rich."[798]

In denying this desire, the *Citizens United* decision echoes of the previous *Buckley v Valeo*[799] decision which stated that with respect to the electoral process, massive resource imbalance can only be rectified by '…subsidising weak voices but not limiting strong ones.'[800]

6:6:1 Reasoning of Court

In stating that 'speech is an essential mechanism of democracy'[801], the Court argues that '…the First Amendment stands against attempts to disfavour certain subjects or viewpoints or to distinguish among different speakers, which may be a means to control content.'[802] Therefore, in the context of political speech, 'there is no basis for the proposition that…the Government may impose restrictions on certain disfavoured speakers.'[803] Consequently, the Supreme Court argued that although corporate speech in the form of independent expenditure may affect or even distort electoral outcomes, this contention cannot be utilized to restrict a fundamental right such as free speech.

> "The First Amendment prohibits Congress from fining or jailing citizens, or associations of citizens, for engaging in political speech, but *Austin's* anti-distortion rationale would permit the Government to ban political speech because the speaker is an association with a corporate form. Political speech is "indispensable to decision-making in a democracy, and this is no less true because the speech from corporations based on the latter's special advantages of, *e.g.*,

[798] Neuborne, Op cit, 1057-58
[799] *Buckley v Valeo*, 424 U.S. 1 (1976)
[800] Ibid, at 93- in 2011, the Supreme Court invalidated an Arizona State Law providing matching funds for candidates at a financial disadvantage. In *McComish v Bennett*, 564 U.S.(2011), Chief Justice Roberts argued
"…the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign…Arizona's matching fund provision substantially burdens the speech of privately funded candidates and independent expenditure groups without serving a compelling state interest. At 29
[801] *Citizens United*, Op cit, Syllabus Opinion 2(a)
[802] Ibid
[803] Ibid

> limited liability, does not suffice to allow laws prohibiting speech. It is irrelevant for First Amendment purposes that corporate funds may "have little or no correlation to the public's support for the Corporation's political ideas."[804]

In taking this view, the Supreme Court has as it also did in *Buckley* defined the conception of *equal respect* underlying the First Amendment as an equal right to autonomous speech. The ability to spend money advocating the election or defeat of a candidate is viewed as a legitimate form of autonomous speech. Consequently, the freedom of an individual or corporation to spend unlimited amounts of money is judged as 'crucial to maintaining the autonomous capacity to decide for yourself whether and how to speak.'[805] While such a contention may contain a degree of validity in isolation, its uncontested application in a competitive electoral context contain serious implications for the basic fairness of such procedures

6:6:2 Implications

Firstly, at a general level, to interpret the First Amendment as merely an instrument of autonomy completely independent of democracy allows not only speech which ideologically challenges the validity of democracy[806] but also contested manifestations of 'expression' which harm its effective functioning.

> "The prevailing conception of the First Amendment as a check on democracy leads to creation of a regulatory vacuum in which the "speaker" may engage in privileged behavior free from government interference. Most of the time, the privileged behavior reinforces democracy, but, as with any powerful autonomy norm, private actors are free to operate in the regulatory dead space in ways that harm democracy…"[807]

This is particularly the case with regard to the ability to spend money during election campaigns. Unlimited campaign spending by one side may drown out legitimate

[804] Ibid 2 (C(1))
[805] Neuborne, Op cit, 1062
[806] As in *Yates*- See Section 1:2:1
[807] Neuborne, Op Cit, 1061

voices in a competitive process and thus establish conditions of inequality and unfairness. A failure to regulate such spending constitutes, it is contended, a much more effective method of controlling content than regulating to establish conditions of relative equality. Electoral Campaigns fought on unregulated financial disparities are likely to skew the political agenda and thus have a disproportionate affect on political outcomes.

> "The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match…In a[n] election…the interests of non-resident corporations may be fundamentally averse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of elections, they can flood the market with advocacy that bears 'little or no correlation' to the ideas of natural persons or to any broader notion of the public good. The opinions of real people may be marginalised."[808]

It is in response to and against such marginalization that legislative attempts to enforce regulation of campaign finance are partially motivated. They can also be viewed as an attempt to provide substance to the rights to associate and cast a meaningful ballot referenced in the *Williams* and *Communist Party* cases.[809] The decision of the Court in *Citizens United* to overturn such legislation undermines the ability of the American citizenry to govern themselves.

> "At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense… While American democracy is imperfect, few outside the majority

[808] *Citizens United*, Op cit, Stevens J, Dissenting Opinion, 81
[809] See Section 1:2:2

> of this Court would have thought its flaws included a dearth of corporate money in politics."[810]

6:6:3 Citizens United and the four guiding principles

This case takes on a different form than the majority of cases which will be analysed throughout this thesis. Firstly, it is concerned not with the content of advocacy but the form that advocacy takes through the spending of money. Secondly, the relevant legal measures seek not to regulate institutions such as political parties who are viewed as intrinsic to the democratic process but the actions of corporations whose role within the democratic process is subject to substantive contestation. Finally and as a result of this, the legal measures relevant to this case do not involve the dilution of procedural equality in pursuit of and/or protection of particular goals; they involve regulation of specific manifestations of expression as a means of achieving procedural equality. Despite these differences, this case raises as many fundamental questions in relation to the balance to be struck between the four principles as any other. The decision made by the Supreme Court in *Citizens United* protects a specifically autonomy centred conception of equal respect at the expense of a satisfactory balance.

In protecting the right of corporations to spend an unlimited amount of money during electoral campaigns, it is contended that the Court has undermined all four principles to some degree. With regard to the principles of representation, the ability of all citizens to have their views heard during the election campaign and as a consequence their interests considered by those elected is adversely affected by the presence of potential massive resource imbalances between candidates and parties contesting specific elections. Next, with regard to the principles of equal respect and popular sovereignty, the decision invokes a specific autonomy based conception of equality to invalidate measures designed to equalize the conditions under which the mechanisms of popular sovereignty operate and thus give essence to the rights closely associated with such processes. Finally, with regard to changeability, protecting the right of the wealthy to use their wealth in order to affect electoral outcomes is likely to produce elected representatives who are not only beholden to special interests but who are unlikely to challenge the economic and social structures which facilitate the accrual of

[810] Stevens J, Dissenting Opinion, Op cit, 90

such enormous wealth. Protecting the autonomy of the wealthy to dominate the political process not only undermines all four principles, it also potentially undermines the peoples' faith in democracy. Such disenchantment is dangerous in a system of government premised on popular participation.

> "In addition to this immediate drowning out of non corporate voices, there may be deleterious effects that follow soon thereafter. Corporate 'domination'[811] of electioneering…can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders 'call the tune'[812] and a reduced 'willingness of voters to take part in democratic governance.' [813]

6:7 Conclusion: The US and the four guiding principles

The identification of the United States as primarily a procedural democracy is suggestive of an unyielding commitment to the principle of *equal respect* in the form of an autonomous right to free speech independent of and protected from specific manifestations of the other three principles. The approach taken by the Supreme Court in cases such as *Yates* where restrictions can only be justified in reference to advocacy directed at inciting illegal action and latterly, *Brandenburg* which imposes the additional prerequisite of imminence lends this estimation a degree of validity. However, other evidence presented in this chapter indicates that such a contention is too simplistic and fails to grasp the complexity of the relevant First Amendment

[811] *Austin,* Op cit, at 659
[812] *McConnell v Federal Election Commission,* 540 U.S. 93 at 144 quoting *Nixon v Shrink Missouri* 528 U.S
[813] Ibid, Stevens Dissent, Op cit at 81

jurisprudence. While the principle of equal respect has often been utilised at the expense of the other three principles, there have been notable examples of these principles being applied to dilute the seemingly unbreakable commitment to equal respect. Also, there are examples of equal respect being applied in a manner consistent with the reinforcement and maintenance of the other three.

While the early cases of *Schenck* and *Abrams* indicate a belief that a qualification of the equal right to free expression can be justified on the basis of protecting the State from internal or external enemies irrespective of their commitment or otherwise to democracy. The Smith Act of 1940 with its focus on those who adhered to totalitarian ideologies constituted a reflection of a perceived need to restrict equal rights for the purpose of protecting the continued existence of democratic government and elections. Limitations were to be placed on the tolerance of short term advocacy of radical change and its subsequent potential representation in order to protect those structures which facilitated in the long term, both the survival of representative government and the availability of change. It is noteworthy that the subsequent case, *Dennis* implied that the potential gravity of such a danger was sufficient to justify an invasion of relevant rights irrespective of probability or imminence.

Next, with regard to popular sovereignty, the idea that judicial reasoning on these matters is immune from popular pressure does not bear scrutiny. The *Schenc*k and *Abrams* cases[814] reflected popular misgivings with respect to the tolerance of advocacy perceived as hostile to a war effort while the potentially wide template for restrictions afforded by *Dennis* took place within a political context dominated by McCarthyism and anti-Communist paranoia.[815]It is also surely no coincidence that the jurisprudential retreat from *Dennis* exemplified by *Yates* occurred within a time frame consistent with the discrediting of McCarthyism and its tactics.

Finally, the principle of equal respect has been given jurisprudential recognition in ways that extend beyond an identification of purely autonomous behaviour independent of popular sovereignty. With respect to the explicit issue of regulating the

[814] See Robert K. Murray, *Red Scare,* University of Minnesota Press, 1955
[815] For an excellent historical survey of the McCarthy era- see Ellen Schrecker, *Many are the crimes: McCarthyism in America*, Princeton University Press,1998

access of political parties to the electoral arena, the cases of *Williams* and *Communist Party* display a reading of the First Amendment which interprets equal rights of speech and association as structural contributors to the processes of popular sovereignty rather than simply constituting bulwarks against their outcomes. These cases established an equal right to advocate change potentially inconsistent with the maintenance of democratic structures and to have those views represented at a legislative level through success at the ballot box.

It is contended that the balance between an 'autonomy' centred reading of the First Amendment as exemplified in *Brandenburg* and a 'democracy' centred approach given recognition in *Communist Party* is a valuable one with regard to the facilitation of the existence of continuing disagreement as well as a functioning balance between the four principles. The continued right to challenge the desirability of democratic government and offer an alternative through representative elections is a crucial element of a collective deliberation premised on fundamental disagreement and the availability of change. The equal right also to contribute to processes which provide a temporary resolution of substantive disagreement is a vital factor in popular acceptance of the temporal legitimacy of democratic outcomes if not their enduring validity.

Such a balance while valuable is also precarious and it is from this perspective that there exist concerns about the judicial reasoning applied in both *Humanitarian Law Project* and *Citizens United.* In the former, the Court dilutes the equal right to autonomous speech by identifying a competing public interest in the form of protecting the homeland from terrorism and subsequently affording deference to relevant assessments made by both direct and indirect agents of popular sovereignty. In the latter, the Court invokes the same right to autonomous free speech it qualified in *Humanitarian Law Project* to invalidate an attempt by elected representatives to equalize the conditions of popular sovereignty under which they are chosen and thus give practical effect to the rights relevant to this area. These decisions negatively affect the balance necessary to the continued existence of substantive disagreement. *Humanitarian Law Project* seems to suggest that any dialogue with foreign organizations deemed by the State Department to have connections with terrorism can be criminalized even when such dialogue is peaceful in both content and intent. This

has negative implications for the representation of views which may be deemed to be temporally unpopular and places limits on those wishing to pursue change in the direction of US foreign policy. The *Citizens United* decision allows for an unregulated right to buy expression within the electoral arena. While such a situation is respectful of formal equality, its practical effect might be to drown out alternative voices and thus produce both an ideological and legislative consensus which does not effectively represent the real interests and preferences of ordinary citizens and thus potentially eliminates even the prospect of substantive change. Such a scenario may potentially lead to disaffection with democracy amongst the American citizenry. If such disenchantment were to emerge, its effects could pose long term questions regarding the attitude of the populace regarding their continued participation within the system and their willingness to abide by the outcomes that it produces.

CONCLUSION

7:1 Introduction

The substantive chapters of this thesis have attempted to accomplish a dual goal. Firstly, they have described the legislative and constitutional measures available within each jurisdictional context to those willing to permit short term deviations from democratic norms in the pursuit of the goal of both the long term survival and sustainability of democracy. Next, they have evaluated both the constitutional existence and practical application of these provisions in the light of previously identified guiding principles . The purpose of each evaluation is to ascertain whether the balance struck between these principles within each jurisdiction and specific case is such as to continue to facilitate the twin goals of protecting democracy and allowing the continuation of real substantive disagreement. Similarly, the conclusion will pursue a two-fold strategy. Firstly, it will attempt to place each jurisdiction and its relevant jurisprudence within a continuum of legal intervention at least partially inspired by previous attempts at classification. Then, it will conclude by evaluating which (if any) of the legal interventions can be justified with reference to the four guiding principles and consequently establish a template for the future with regard to future dilemmas.

7:2 A classification of arrangements

The best known work with respect to classifying democratic jurisdictions in relation to their propensity to use short term restrictive measures for the long term stability of democratic government was written by Fox and Nolte[816] in 1995. Using the suspension of elections in Algeria in 1991[817] as a starting point for discussion, Fox and Nolte succinctly describe the dilemma at the heart of questions relating to party prohibition.

[816] Gregory.H.Fox and Georg Nolte, 'Intolerant Democracies' in *Harvard International Law Journal*, Volume 36, 1995, 1-70

[817] The Army took action between the first and second round of elections out of fear that the Islamic Salvation Front (FSI) would win a majority large enough to effectuate constitutional change and set up an Islamic state- See Ibid,6-9

> "Even though tolerance is bedrock of democratic government, it may be argued that where the survival of democracy itself is threatened, survival takes precedence over tolerance. On the other hand, the exclusion or suppression of political parties based on their allegedly subversive nature goes to the heart of the democratic process. Whilst preservation of a democratic process is a laudable goal, experience suggests that the power to exclude groups from the political process is often exercised arbitrarily and in a fashion that detracts from rather than enhances the democratic character of the state."[818]

Referencing also the experience of Weimar Germany and the rise of the Nazis,[819] the authors proceed to apply the terms procedural, substantive, tolerant and militant to classify both the extent of measures legally available as well as the incidence within specific jurisdictions. The terms procedural and substantive are defined in an identical matter to those described in the introductory chapter of this thesis. Procedural democracies are those which provide a mechanism (through majority rule) for the collective resolution of disputes but which place no limits on the substantive decisions which can be made.[820] Substantive democracies by contrast view democracy as not only a system to '[ascertain…] the preferences of political majorities, but as a society in which majority rule is made meaningful.'[821] The procedures of democracy cannot be used as a mechanism to destroy those rights and freedoms which are at its essence.[822]

Fox and Nolte then further subdivide democratic countries by assigning the adjectives tolerant and militant to said democracies with respect to how passive or active they are in enforcing restrictive provisions against actors within the democratic arena. Subsequently, they come up with four typologies to describe and encompass state practice in this field. These are tolerant procedural democracy; militant procedural

[818] Fox and Nolte Op cit, 8
[819] Ibid 12
[820] Ibid, 15 and 16
[821] Ibid, 16
[822] Ibid, 17

democracy; tolerant substantive democracy and finally militant substantive democracy.

7:2:1 Jurisdictional Classification

In applying these typologies to the jurisdictions covered within this thesis, it becomes evident that while some jurisdictions can be placed obviously within particular categories, in others the discrepancy between symbolic measures on one hand and actual practice on the other make for a less comfortable fit.

The first case study of Turkey represents clear evidence of a militantly substantive approach. Turkish authorities have consistently dissolved parties that are deemed to threaten substantive goals such as the country's territorial integrity and the secular nature of the State. For the most part, the approach of the European Court has been consistent with a mainly tolerant and procedural approach in that it has declined to uphold the vast majority of dissolutions. However, in the case of *Refah,* the Court adopts a militantly substantive approach towards political Islam out of kilter with its own guidelines. By contrast, the next jurisdiction, Spain finds itself sitting uncomfortably within the typologies suggested by Fox and Nolte. While the relevant authorities actively and successfully sought the prohibition of a specific political party in the case of *Batasuna* and can thus be accurately described as deploying a militant approach, the party in question were banned as a result not of ideological attachment to specific substantive goals but in their refusal to condemn a violent act perpetrated by a closely aligned terrorist group. Therefore, the decision by the European Court of Human Rights to uphold the prohibition (whatever its evidentiary merits) is consistent with the Venice Commission's guidelines that dissolution of a party can only properly be applied when the relevant party advocates the use of or uses '…violence as a political means to overthrow the existing democratic constitutional order.'[823] Those who 'advocate a peaceful change of the constitution'[824] should not be subject to dissolution. In this regard, the Strasbourg Court can be argued to applying an active yet mainly procedural approach in that attachment to substantive goals is not considered a sufficient ground for dissolution.

[823] Venice Commission Guidelines, Op cit at 3.
[824] ibid

The third case study considers those polities which recently emerged from the ashes of totalitarianism. Post Nazi Germany and many of the countries which emerged from Communist rule in the early 1990s have all established substantive objectives within their constitutions which are deemed of sufficient importance that parties who profess antipathy towards or actively campaign against these objectives potentially find themselves subject to legal restrictions up to and including prohibition. However, there has also been a noticeable lack of attempts at enforcing these measures in recent years. Those prohibitions successfully pursued have tended to occur relatively early within the post-totalitarian era and have been motivated (as in the cases of SRP and KPD in Germany) by symbolic and geopolitical factors. Therefore, while Germany in particular has been classified as a militant substantive democracy, [825] recent rather than historic practice suggests a trend towards a more tolerant if symbolically substantive approach. A similar dynamic is evident in regard to the fourth case study of Israel in that the typology applied by Fox and Nolte does not fit easily with relevant case law. With reference to Israeli practice, Fox and Nolte apply the typology of 'militant substantive'. [826] Their rationale for doing so includes recognition that within Basic Law 7A, there exist substantive objectives such as 'denial of the existence of the State of Israel as the State of the Jewish nation'[827] and 'incitement to racism'[828] upon which exclusion of a party list from the electoral arena can be legally justified. They also reference the disqualification of the Kach Party in 1988[829] as evidence that disqualification on substantive grounds is both actively pursued and often upheld. While such an assertion may have merit in that politically motivated groups have often utilised the Central Elections Committee as a mechanism for the marginalisation of political opponents, the approach adopted by the Israeli Supreme Court in recent cases suggest (at least at the judicial level) evidence of a more tolerant approach to the rights of anti-system parties in seeking to achieve electoral recognition of their views.

By contrast, with regard to the penultimate case study, the assignation by Fox and Nolte of the United Kingdom as a tolerant procedural democracy is one with which

[825] Ibid, 33 and 34
[826] Ibid, 34 and 35
[827] Referenced in ibid, 34
[828] Ibid
[829] Ibid,35

this thesis would concur.[830] While the introduction of the Human Rights Act may suggest a tentative step in a more substantive direction, the continuing existence of parliamentary sovereignty alongside the proclivity of UK governments to allow 'extreme' parties to continue to organise and contest elections make such an assignation more or less accurate. The final case study is however a little more problematic. Fox and Nolte place the United States within the militant procedural category[831]arguing that while the absence of any rule which '…precludes the remote possibility of amending the Constitution to abolish a republican form of government'[832] places it firmly within a procedural orbit, the tendency exemplified *inter alia* in the Smith Act of 1940[833] to place restrictions on those deemed a threat to national security allow for an assignation of militancy. While it is undoubtedly true that restrictions were legislated for and judicially upheld during and in the aftermath of World War II and there have lately been creeping signals of militancy with regard to groups tenuously linked to terrorism; the overwhelming propensity since *Brandenburg* has been for the judicial branch to give political expression wide latitude unless it incites or is directed at inciting impending illegal activity. This pattern it is argued places the United States more comfortably in a tolerant context.

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While the typology adopted by Fox and Nolte has value, there are evident problems associated with it. The primary weakness is that it fails to recognise the complexities inherent within as opposed to between jurisdictions. For example, as just discussed, the assignation of militant substantive status to both Israel and Germany failed to take account of the emergence of growing jurisprudential and political tolerance respectively. An alternative approach is offered by Otto Pfersmann.[834] Pfersmann argues that all democracies can be classified as either more or less militant.[835] He contends that in reality, most functioning democracies can be contrasted with the idea of a pure open democracy where there are no effective limits on what can be done in the name of a democratically elected majority.

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[830] Ibid, 22
[831] Ibid, 24
[832] Ibid
[833] Ibid, 25
[834] Otto Pfersmann, 'Shaping Militant Democracy: Legal limits to Democratic Stability' in Andras Sajo (ed), *Militant Democracy*, Eleven International, (2004), 47-68
[835] Ibid, 53-68

> "All things being equal, the competence of the open democratic legislator is unrestricted. This means that any possible human behaviour can be the target of such normative provisions, including the abolition of the open democratic procedures and their replacement by more oligarchic decision making or even dictatorship. In such a structure, democracy is legally contingent on the democratic stances of the majority of …voters. If they are in favour of maintaining the system as it goes, it will be maintained; if, for, whatever reason, discontent becomes majoritarian, open democracy will openly and democratically disappear."[836]

Pfersmann contends that all democracies are more or less militant in contrast to the entirely open democracy described above. Those polities which place more limits on structural and constitutional change are described as more militant in contrast to those which utilise less restrictive measures. With reference to the order of this thesis, it can be argued that it has deployed an effectively 'pfersmannian' approach in that the substantive chapters have been place in a 'more or less' linear order from the militancy of secular Turkey to the constitutional proceduralism of the United States. While it may seem counter-intuitive to adopt an approach which seems relatively simple while being critical of Fox and Nolte for their failure to grasp the complexities within jurisdictions; it is the very simplicity of a 'more or less' approach which allows the flexibility to study the different ways in which legal provisions, jurisprudence and political culture interact within any jurisdiction at any specific times. Thus Turkey and Spain are the first two substantive case studies as both countries have recently deployed highly invasive interventions within the political arena which have been upheld by the European Court of Human Rights. Post- Nazi Germany and other post-totalitarian polities as well as Israel have been placed in the middle of the thesis because while they symbolically display a façade of militancy, recent practice informs a more tolerant procedural approach. Finally, the last two substantive chapters within the thesis are the United Kingdom and the United States as they have (with exceptions) tended to allow a greater degree of latitude to political actors than within the other case studies.

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[836] Ibid, 54-55

However, while this 'more or less' approach is useful as a tool to inform the placement of substantive chapters; it does not represent the main focus of the thesis. Indeed, it is the opinion of this thesis that such an approach asks the wrong question. As Samuel Issacharoff has argued, 'the key point is not the ubiquity of prohibitions but the rationale for them.'[837] Rather than simply concern itself with applying classifications to the approach applied by different jurisdictions in relation to party prohibition, the primary focus is to assess the legitimacy of these approaches in light of the four identified principles of democracy and the need to continually facilitate substantive disagreement and identify the circumstances when, if ever, party prohibition is morally, legally and democratically justified.

7:3 An assessment of legitimacy

Each substantive chapter has analysed the extent to which the jurisdiction or specific case in question has struck a satisfactory balance between the four identified principles of democracy. Taking each chapter in order, the following general observations can be made. Evidently, it is within the opening two case studies of Turkey and Spain and more specifically the cases of *Refah Partisi* and *Batasuna* that the most grievous imbalances and thus challenges to democratic disagreement can be located; an assertion aggravated by the fact that both decisions were upheld by the Court of Human Rights in Strasbourg. In the former case, the dissolution of a party who were the focal point of a great degree of popular support was upheld because the Court decided that the said party was ideologically indisposed towards democracy despite the lack of any convincing episode for such an assertion. The equal right to propose change and achieve representation for such views was violated on the basis of assumptions which lacked intellectual depth and thus credibility. In the former case, a vehicle for the articulation and aggregation of preferences of a national minority was removed from the polity not for its own advocacies or actions but primarily for its refusal to condemn terrorist actions in a specific context.

With regard to Germany and other post-totalitarian societies, there is growing evidence of the emergence of an uneasy if appropriate balance between the four

[837] Issacharoff, 2007, Op cit, 1410

guiding principles. While the relevant polities all have constitutional provisions allowing for party prohibition for advocacy of or attachment to what are deemed illegitimate substantive goals, recent practice suggests that the importance of such provisions are primarily symbolic and that toleration of such advocacies have increased as the relevant democracies have matured and consolidated. A similar balance seems also to be emerging within Israel. If reference is only made to relevant legislation pertaining to a party's right to contest elections, the four guiding principles seem well out of balance with each other. Effectively, the equal right to contest the processes of popular sovereignty can be restricted by temporal opponents on the grounds that the substantive goals of relevant parties are illegitimate. Such a step undoubtedly narrows the range of views represented within the Knesset and at least temporarily places limits on the type of change that can be legislatively pursued. However, the actions of the main unelected body in this process, the Supreme Court have facilitated a restoration of equilibrium between the four principles by establishing a high evidentiary threshold for disqualification resting on the identification of concrete actions taken towards rather than simply ideological attachment to the relevant goals.

In the penultimate case of the United Kingdom, the dominance of the constitutional norm of parliamentary sovereignty has left individuals and political parties relatively free to pursue their visions of change. While passage of the Human Rights Act has perhaps unintentionally laid down a tentative legal framework for restriction of the rights necessary to democratic deliberation and contestation, the prevailing political climate favours a tolerant if disapproving approach to those parties which espouse what can be considered as extreme positions and thus the four principles continue to interact in such a way as to maintain the existence of substantive disagreement and the continued possibility of change With regard to the final example of the United States, the dominant interpretation of clear and present danger established under *Brandenburg*[838] facilitates the continuation of substantive disagreement. Representatives elected under the processes of popular sovereignty are constitutionally unable to pass legislation which restricts the equal rights of individuals and political parties to advocate change and seek representation for their

[838] Section 6:2:3

views through the mechanism of regular elections. While the *Humanitarian Law Project*[839]case is suggestive of a creeping militancy towards groups linked to current or former terrorist organisations, it is contended that the most obvious threat to a balance between the four guiding principles comes from the influence of money on the political process; an influence strengthened by the implications of *Citizens United.*

In summary, it is contended that the final four case studies maintain a generally satisfactory balance between the four principles whether through accident or design while the first two jurisdictions exhibit a hastiness to protect the relevant polities from the perceived threats of terrorism and political Islam. In making such rash decisions, there is a danger that they have undermined the very democratic foundations they were intending to protect.

7:4 Is Prohibition ever necessary?

The assertion that the prohibitions of both *Batasuna* and *Refah* are illegitimate on democratic grounds does not necessarily mean that all party prohibitions are without redeeming value. In his 2007 article, 'Fragile Democracies',[840]Samuel Issacharoff distinguished between three types of party that may be legitimately subject to attempted prohibitions. These are insurrectionary, separatist parties and anti-democratic majoritarian parties. Issacharoff defines insurrectionary parties as those

> '…who participate in the electoral process for the purpose of propagandizing their views but without any real prospect of competing for political office.'[841]Their main challenge to the established political order is not that they may gain power but that 'they use the electoral arena as an organizing forum for insurrectionary attacks on the State.'[842]

Issacharoff references the KPD in Germany as an example of such a party. He then proceeds to define 'separatist' parties as organisations which 'invariably fuel their support by opposing the perceived oppression of a distinct regional or ethnic subset of

[839] Section 6:5
[840] Issacharoff, (2007), Op cit
[841] Ibid, 1433
[842] Ibid

the population.[843] Referencing *Batasuna,* Isacharoff argues that separatist parties present similar challenges to democracies as those of an insurrectionary nature and as such any attempt to legally dissolve them should meet a similar legal standard. The test which he applies to both is the *clear and present danger* test.

> "…separatist parties, like insurrectionary parties [should be] given a broad swathe of protection so long as they are not engaged in actual incitement or violent acts against the democratic regime. In the case of separatist parties, the overlay with the claims of an embattled minority should enhance the level of judicial solicitude for these parties and restrict the ambit of permissible state repression."[844]

It is difficult to argue with Issacharoff in this regard. In the absence of a collective incitement to or the collective commission of illegal and/or violent acts, the prohibition of an entire political party represents an unwarranted and disproportionate step. In this regard, it is of relevance to point out that many of the other parties referenced within this thesis would meet the criteria of insurrectionary or separatist applied by Issacharoff. To give a couple of examples, Batasuna , Sinn Fein and Balad can be described as both insurrectionary and separatist whereas avowedly racist or anti-immigration parties such as the BNP in the UK, Kach in Israel and the workers party in the Czech republic can be placed firmly within the insurrectionary category.

Consequently, any attempt to legally dissolve such parties should be based on their incitement or commission of illegal conduct and not simply because their ideological goals inspire distaste within the majority of the population. Issacharoff then discusses what he describes as anti-democratic majoritarian parties. He argues that democratic states should have a right of self-defence against those parties which both inspire popular support and display an avowed antipathy towards democracy and in doing so references part of the Court's reasoning in the *Refah* case.

> "[A] State cannot be required to wait, until intervening, until a political party has seized power and begun to take concrete steps to

[843] Ibid, 1437
[844] Ibid, 1442

> implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent…"[845]

There is a degree of merit in the Court's reasoning here. The possibility of an avowedly anti-democratic party taking power through democratic means and then abolishing democracy has historical resonance and immense implications. States should indeed have the right to legally prohibit those parties who pose a dual threat to democracy. However, this dual threat must include both an acknowledged ideological antipathy towards the continuation of democratic government and a level of popularity such that the realisation of that goal through the mechanism of forthcoming elections is a realistic prospect. If a party has an anti-democratic ideology but has no realistic prospect of gaining power then prohibition is a measure disproportionate to the danger posed and a barrier to the embracement of democratic norms by those ambivalent to its value. If a party is popular but not clearly anti-democratic then prohibition sends a signal to a large amount of voters that their specific concerns are not valid and worthy of representation. It is difficult to think of an alternative measure more likely to provoke disenchantment amongst a general populace concerning the continuing value of democratic norms. The reasoning applied by the Court here has two main flaws. Firstly, as evidenced in the first substantive chapter, the Court was incorrect in its assumption that *Refah* were intrinsically anti-democratic mistakenly assigning policies that it deemed illiberal as proof of anti-democratic credentials. This is further evidenced by the fact that the Court argued that policies incompatible with the Convention as well as democracy may serve as grounds for prohibition. Indeed, one of the fundamental weaknesses of many of the legal provisions and subsequent cases discussed within this thesis is that they were not instigated and enforced to protect democratic government as a whole but a specifically liberal version of democratic government.

[845] Ibid, 1445 referencing *Refah,* Op cit, (2001) at 91

7:5 Conclusion: The limits of Liberalism and the necessity of Pluralism

In his book, Two faces of Liberalism, [846]John Gray argues that liberalism as a philosophy wrestles with two contradictory impulses. One is the pursuit of a rational consensus on the ideal way of life while the other validates a system which allows differing conceptions of the ideal life to co-exist.

> "Liberalism has always had two faces. From one side…is the pursuit of an ideal form of life. From the other, it is the search for terms of peace among different ways of life."[847]

A pattern which emerges from such contradictory impulses is that proponents of a liberal form of democracy (in a desire to protect the equal autonomy of individuals) place limits on change by moving certain decisions of social importance beyond the realm of collective decision makers elected through the mechanism of popular sovereignty. Party prohibition can in some cases be viewed as endeavouring to fulfil the same task by a radically different method in that it attempts to ensure that potential collective decisions of which it disapproves are not even attempted as those who would wish to enforce such decisions are not afforded the right to seek representation. While paying lip service to the principles of popular sovereignty and equal respect, liberalism comes down heavily in favour of the latter.

> "Their move consists in reformulating the democratic principle of popular sovereignty in such a way as to eliminate the dangers that it could pose to liberal values. It is the consciousness of those dangers that have often made liberals wary of popular participation and keen to find ways to discourage or limit it."[848]

What then can constitute an alternative to liberal democracy and maintain a sufficient balance between the four guiding principles that disproportionate measures are not utilised against political parties. Michel Rosenfeld argues that an approach known as

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[846] John Gray, *Two Faces of Liberalism,* Polity Press, 2000
[847] Ibid, 2
[848] Mouffe, 2000, Op cit, 3

comprehensive pluralism is one that can fundamentally maintain the conditions necessary for the continued existence of substantive disagreement. He argues that the sole intention of comprehensive pluralism is to promote a plurality of views on all topics of social importance.

> "…it is good to protect and promote as many competing conceptions of the good as possible and that justice is inextricably linked to pursuit of the pluralist good. From the pluralist standpoint, no religion is inherently superior to, or 'truer' than, any other, and no ideology, culture, or lifestyle is *prima facie* better than any other."[849]

While liberal democracies do afford a healthy degree of tolerance to views which oppose their fundamental tenets, the advantage of a comprehensively pluralist approach is not that it tolerates a plurality of views but that it is essentially defined by it.

> "Ultimately, comprehensive pluralism depends for its survival on the availability of conceptions of the good that differ from its own views. Liberalism, in contrast, does not depend on illiberal world view for its vindication, though it can afford limited tolerance to the latter… Comprehensive pluralism is a conception of the good but it differs from all others in being both open toward, and dependent upon, other conceptions of the good."[850]

Rosenfeld also argues that if polities face major crises such as the prospect of civil war or foreign invasion or even civil war, then a temporary suspension or dilution of some political rights may be appropriate.[851] However, he categorises situations such as the commission of terrorist acts or peaceful secession as merely stresses within a polity that should be absorbed with the need to resort to disproportionate prohibitions.[852] The challenges posed by the relevant political groups discussed throughout this thesis merely represent stresses within their own polity rather than

[849] Rosenfeld, Op cit, 17
[850] Ibid, 17-18
[851] Rosenfeld, Op cit, 27
[852] Ibid

elements contributing to a full blown crisis. With a nod to the four guiding principles, it is the final conclusion of this thesis that in order for there to be a satisfactory balance maintained between them, then prohibition can only be considered when there is convincing evidence that the party in question poses both an ideological and sufficiently practical and imminent threat to the continuing existence of both democratic government and the fundamental disagreement required to sustain it. The prohibitions (successful or otherwise) that have constituted much of this thesis's subject matter have not met these criteria. They have in general terms placed a primarily autonomy based view of equal respect ahead of representation, popular sovereignty and changeability. Such actions signal either an actual or proposed reduction to the arena of democratic contestation. Further steps in this direction may potentially lead to growing disaffection with democratic norms and a desire to resolve disputes that should properly be the subject of democratic contestation with the adoption of less peaceful methods.

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